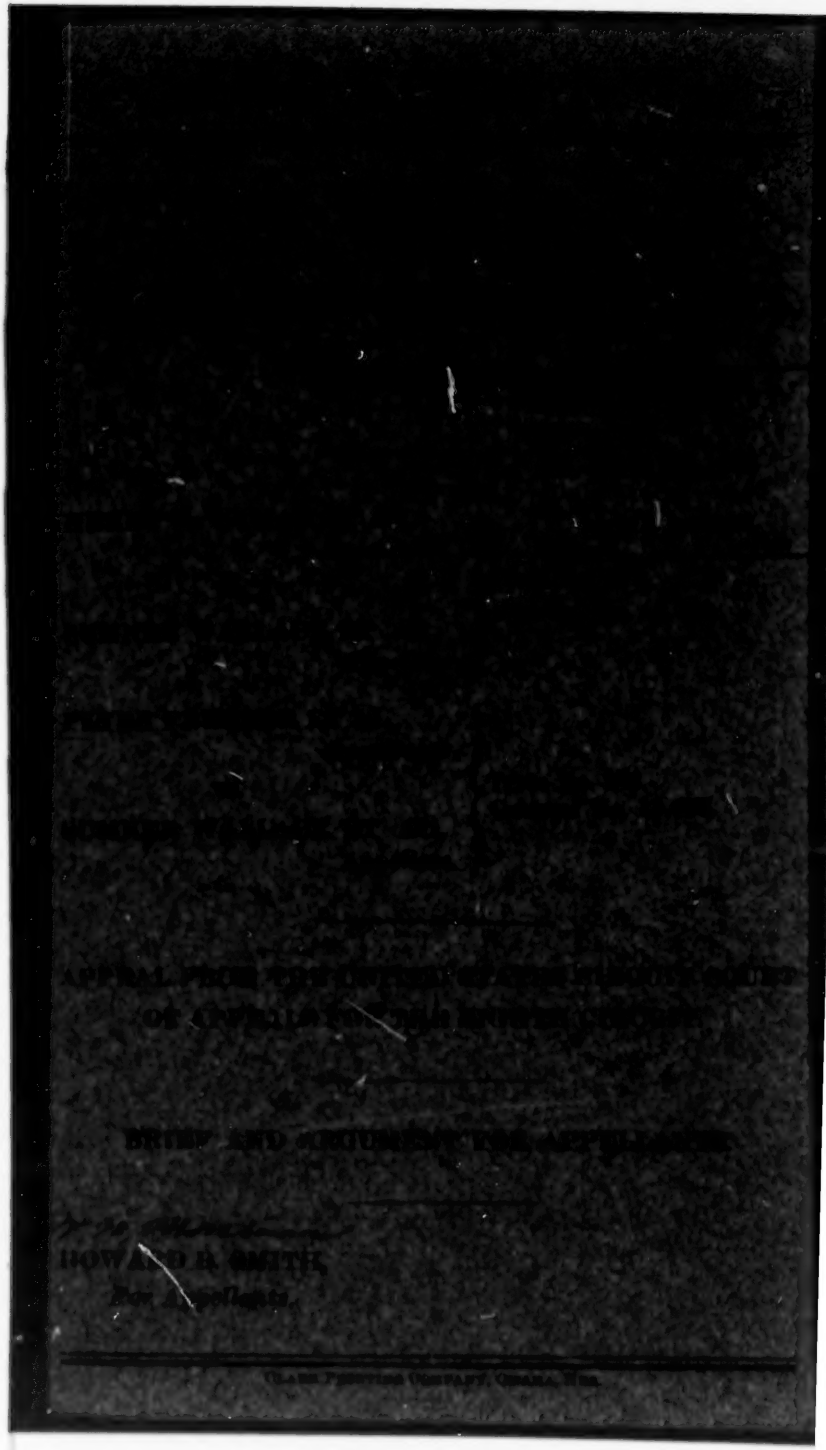

Supreme Court of the United States

HENRY F. WYMAN ET AL.,
Appellants,
vs.
SUMNER WALLACE ET AL.,
Appellees.
Term No. 191.
General No. 19,652.

PETER FRENZER ET AL.,
Appellants,
vs.
SUMNER WALLACE ET AL.,
Appellees.
Term No. 192.
General No. 19,653.

BRIEF AND ARGUMENT FOR APPELLANTS.

The appellants in the above entitled cases were shareholders in the American National Bank of Omaha and were, with other shareholders, held liable for the balance remaining unpaid upon three notes executed and delivered in the name of the American National to the Union National Bank of Omaha, in and by a decree of the Circuit Court in and for the District of Nebraska, and that decree was affirmed by the Circuit Court of Appeals, Eighth Circuit.

It will save time and prevent repetition to consider the two appeals in one brief.

STATEMENT OF FACTS.

The American National Bank and the Union National Bank had for several years prior to December 21, 1895, been engaged in business in Omaha, Nebraska; the former at the

northwest corner of Fifteenth and Dodge streets, and the latter at the southeast corner of Sixteenth and Dodge streets. They were by reason of their very proximity, competitors for business. Mr. Baird, one of the complainant's witnesses (there were no witnesses called by defendants), testified that he became a director of the American in the fall of 1893 (Record, p. 143) and that the American had never from that time down to December 21, 1895, failed to pay all demands made upon it. (Pp. 157-158.) On that day, the business and assests of the American were sold (Exhibit 7, p. 255) to the Union and the three notes in controversy herein executed and delivered to it. As an excuse for that transaction, it is now claimed by those who carried it out, that immediately prior to December 21, 1895, it appeared that certain public officers, to-wit: state, county and city treasurers, might soon withdraw their deposits, and that such withdrawals might embarrass the bank. (Mr. Baird, p. 144.) But the evidence is not satisfactory and must leave in the mind of a disinterested reader the clear impression that the real and underlying reason for such action has not been given or that, at least, all the reasons have not been given. However that may be, there was no meeting of the Board of Directors of the American called to provide for such possible withdrawals (Mr. Baird, p. 146), but negotiations were entered into by Mr. Minot of Boston and Mr. Baird of Omaha with certain officers of the Union. (Mr. Baird, p. 146.) Mr. Minot was not a shareholder in the American, but was a creditor of the American, holding a note for $7,000.00, which was paid by the Union on December 28, 1895 (Mr. Raney, p. 183)—a week after the transaction. He also represented the National Bank Building Company, which was a shareholder in the American (Mr. Baird, p. 145) and was the owner of the building in which the American had its office. Mr. Baird, although a director of the American, acted as Mr. Minot's attorney. (Mr.

Baird, p. 145.) When Messrs. Minot and Baird had come to a verbal understanding with the officers of the Union, the directors of the American were immediately called together (Mr. Baird, p. 146), and an agreement was drafted by Mr. Baird. (Mr. Baird, p. 158 and Exhibit 1, p. 250). That agreement was then approved by the directors of the American (Exhibit 7, p. 255) and was signed by the presidents and cashiers of the two banks. All this was done on Saturday, December 21, 1895 --the agreement being signed at 8 o'clock in the evening of that day. (Mr. Baird, p. 147.) The Agreement is marked "Exhibit 1" and appears on page 250 of the Record, and a copy is hereto attached in an appendix as Exhibit A. But before the Agreement was signed and on Saturday afternoon, the clerks of the Union went over to the office of the American and commenced to work on the books and were engaged in that work and in moving the books, etc., of the Union to the office of the American most of Sunday. (Mr. Rainey, pp. 184-191; Mr. Baird, p. 155.) On Monday, December 23, 1895, without waiting to determine the exact balance for which notes should be executed and delivered by the American to the Union as required by the "Third" provision of the Agreement (p. 251), Mr. Wattles, then vice president of the Union, says, (pp. 238 and 239) that the officers of the two banks *estimated* the probable amount of the assets of the American to be taken by the Union as cash, at $39,000.00 or $40,000.00, and, pending the determination of the exact amount, the president and cashier of the American executed and delivered in the name of the American to the Union three non-negotiable notes for $67,000.00, with interest at 6 per cent per annum from that day, payable quarterly, and due in one, two and three years from date, respectively, *and* a cashier's check for $39,000.00 or $40,000.00. Mr. Rainey's figures show this to have been $39,929.51 (pp. 192 and 194) and so does the amended bill (p. 22.) A week or ten

days after, the Union decided not to take $39,929.51 of the assets of the American as cash, but to take only about $22,000.00; and the first cashier's check was taken up and another issued for $17,000.00, and this was afterwards paid out of the assets of the American. (Mr. Wattles, pp. 238 and 239.) Under the terms of the Agreement, this $17,000.00 should have been divided by three and the amount thus fixed should have been added to each of the three notes.

On Monday, December 23, 1895, all the assets of the American were turned over to the Union and to Kimball, trustee, for liquidation. (Mr. Wyman, pp. 170 and 174.) The accounts of the depositors in the American had been entered upon the books of the Union on Sunday, and when the doors opened on Monday, the Union was in possession of the banking room of the American, and in a position to induce its former customers to continue their business with it. At least 200 out of the 400 did so (Mr. Rainey, pp. 184, 194). Incidentally, Mr. Minot promptly drew his $7,000.00, and Messrs. Kimball, president of the American, and Dufrene, a director of the American, became directors of and, of course, shareholders in the Union (Mr. Baird, p. 155 and Exhibit 29, p. 279), and remained such at least down to April 28, 1898.

It seems, however, to have been the opinion of all those who took part in the transaction, whether interested in the American or the Union, that the assets of the American were more than sufficient to meet all obligations of the American. (Mr. Baird, pp. 151, 152; Mr. Wyman, p. 175; Mr. Wattles, p. 240.) But the American had come to an abrupt end, and to all its shareholders, except the officers, an unexpected end. With its doors closed , its business and office in the actual possession of a rival bank, and its assets in the control of the Union and Mr. Kimball, there was nothing—absolutely nothing —which could be done by its shareholders.

Without stopping now to analyze the terms of the Agreement thus consummated, in order to determine its precise meaning, it can be said without fear of contradiction, that the general result was that the Union secured the location, the good-will, the office furniture and fixtures, and absolutely or conditionally all the assests of the American of every name and nature, while it also held three non-negotiable notes of the American aggregating $201,000.00.

On the other hand, the American was relieved of its liabilities "to its depositors and on account of its bills payable," but had *no assets* remaining; while it had still outstanding said three notes aggregating $201,000.00, *and such liabilities* as were not due its depositors or were not of the nature of "bills payable," *and had assumed other liabilities entirely new*, which will be described later.

On February 25, 1896, at a special meeting of shareholders of the American, more than two-thirds of the capital stock voted that the American be placed in voluntary liquidation (Exhibit 14, p. 26), and, without going into details, it appears, so far at least as the writer of this brief is advised, that all the *formal* requirements of the United States banking laws in that regard were complied with in the name of the American.

On January 6, 1898, the directors of the Union (Exhibit 29, p. 279), voted "that said notes be assigned to Sumner Wallace (the complainant) in order that proper legal proceedings may be undertaken in his name to forward the mutual interests of *this* bank and Thomas L. Kimball, trustee, representing such subscribers," i. e., a proposed syndicate of certain of the shareholders of the American (par. 3 of Exhibit 29, p. 279). And, strange to say, among the directors thus voting was Mr. Dufrene, who was formerly (on December 21, 1895), a director of the American, and Mr. Kimball, who was formerly president of the American, and was at that time (January 6, 1898), the

trustee named in the Agreement between the American and Union, and *as such trustee engaged in managing and collecting its assets.*

On August 8, 1898, the directors of the Union (Exhibit 27, p. 278), authorized the assignment of one of the three notes to said Sumner Wallace.

On August 18, 1898, a bill of complaint was filed in the United States Circuit Court for the District of Nebraska against the American, the Union, Thomas L. Kimball, trustee named in the Agreement, and the shareholders of the American.

Succinctly stated, complainant alleges that he is a resident and citizen of the state of New Hampshire, and these appellants of Nebraska, and that the other defendants are residents and citizens of the various states named (p. 2); that the American executed and delivered the $67,000.00 note first due (p. 3); that he is the legal owner and holder thereof by an assignment without recourse (p. 3); that there is due thereon from the American and its shareholders $41,179.76 (p. 4); that the American delivered to Thomas L. Kimball, as trustee, "certain notes and property as security to the notes sued on herein, and other notes given to the said Union National Bank" (p. 4); that Kimball "is made a party hereto in order that he may make a full and complete statement" preliminary to a sale thereof (p. 4); that the American went into voluntary liquidation on January 14, 1896 (p. 5); that the capital stock of the American is $200,000.00, and the defendant shareholders own the amount of shares set opposite their names (p. 5); that *at the time* the American went into voluntary liquidation it was and still is insolvent (p. 7); that this action is brought on behalf of himself and all other creditors. (P. 7.)

The prayer of the bill is that the amount due complainant upon his note may be determined; that it may be ascertained "who the creditors of the said American National Bank are,"

and the amounts due them; that judgments may be entered against the bank and its shareholders; that Thomas Kimball, trustee, be required to report and the securities in his hand sold and applied "toward the payment of the indebtedness so secured, as by law and the *agreement* of said parties they should" be. The Agreement is not not set out or pleaded.

The American demurred, and on September 29, 1899, its demurrer was sustained *for want of jurisdiction*, the Court below saying (p. 11), "jurisdiction of this Court can not be sustained for the reason that it (the suit) does not arise under any law of the United States, and the citizenship of the parties is not such as to give this Court jurisdiction, plaintiff being the assignee of a mere chose in action, its assignor, the Union National Bank, being a citizen of the same state as the American National Bank."

Notwithstanding this, the Circuit Court, on January 8, 1900, said Kimball having died, appointed one James Burness as his successor (p. 18), with the power and authority possessed *by said Kimball under said Agreement.*

On February 17, 1900, (p. 18), complainant filed his amended bill of complaint and refiled the same (pp. 33 and 34), on January 8, 1901.

In this he alleges that negotiations were had between the officers and agents of the American and Union and that such negotiations resulted in the written agreement attached thereto (and hereinbefore referred to), the transfer of the business of the American (p. 21), the assumption of liabilities by the Union, the execution and delivery of the three notes of the American (hereinbefore described), for $201,000.00 (p. 22), and the turning over of the American's assets to Thomas L. Kimball, as trustee under the agreement. (p. 23.) He further alleges that the note first falling was assigned to him without recourse (p, 23), and that $.....is due and owing

him thereon (p. 24); that the Union still holds the other two notes and is a creditor of the American (p. 24); that the defendants were advised of the negotiations and of the condition of the American and have received the benefits of the transaction (pp. 24 and 25); that the assets so turned over to Kimball are now held by Burness (p. 25); that the American went into voluntary liquidation on January 14, 1896, (p. 25); that its capital stock was $200,000.00 (p. 26); that the defendants hold stock in the various amounts set opposite their names (p. 26) and are liable to the amount thereof (p. 28); and "that by *reason of* the voluntary liquidation of the said bank as hereinbefore set forth and the insolvency of said bank, and its inability to meet its obligations, this action is brought against the said American National Bank and its stockholders jointly under and through the authority granted by the laws of the United States *relating to banking.*" (P. 28).

The prayer of the amended bill is similar to the prayer of the bill, except that the amended bill prays (p. 30) that James Burness, as trustee, make report of all the assets of the American "still in his hands and held as security for the claim of your orator and any other (the Union) of the creditors of said bank and to be and abide the order of the court herein as may be equitable and of good conscience to the further end that this honorable court may make due and proper assessment upon the stock and stockholders of said bank as hereinbefore prayed."

On February 4, 1901, the defendants, Peter Frenzer and four others, filed a joint and several answer. In this, they deny that prior to December, 1895, there were conferences with respect to the taking over of the business and office fixtures of the American by the Union and deny that in December, 1895, the American was in such financial condition as to require provision for the payment of a large amount on or about January 1,

1896, and deny it did not have sufficient funds to meet such demands (p. 59); allege that the amount of available cash and cash items then on hand was $49,000.00 instead of $36,970.78 (p. 59); say that they had been informed and believe that negotiations were entered into in December, 1895, which resulted in the affixing of the name of the American to the agreement set out in the amended bill, the transfer of the business of the American to the Union, the assumption of the American liabilities "to its depositors and an account of its bills payable," but deny the payment thereof by the Union (pp. 59 and 60); and deny that the liabilities assumed in excess of the amount accepted as cash amounted to $201,000.00. (P. 61)

They further deny that *the American* executed and delivered the three notes mentioned in the bill, but allege this to have been the act of its officers; and allege that the assets of the American were turned over to the Union (not to Kimball) to liquidate the same (pp. 61 and 62), deny the note first maturing was assigned to complainant (p. 61), or that any sum is due him or the Union (p. 62), or that they are creditors of the American. (P. 64.)

They further say that it is not true and they deny that either of them was advised of the negotiations or their purpose and design, or acquiesced in and consented thereto (p. 63), or was advised of the alleged condition of the American or accepted and received any of the benefits of such contract or ratified and affirmed the same or permitted and induced the Union to pay out any money. (Pp. 62 and 63.)

They deny that the American went into voluntary liquidation (p. 63); admit the holding of certain shares of stock in the American (p. 64); deny that this action is brought under the authority granted by the laws of the United States relating to banking; aver that their liability as shareholders is limited to the *valid* contracts, debts and engagements *duly* entered into

by the American *in the usual and ordinary course of the business of banking;* and deny that "they are liable for the payment of the claim of the plaintiff and of the claim of the said Union National Bank to the amount of stock so held by said defendants or to any other amount or to any extent whatsoever."

They then set out the resolution of the Board of Directors of the American, passed December 21, 1895, (p. 65-68), the execution by Thomas L. Kimball of the Agreement (p. 68). the turning over of the assets of the American to the Union (p. 68.), the removal of the Union to the office of the American and the taking of its office fixtures (p.69), the execution and delivery of the three notes by Kimball in the name of the American (p. 69), the existence *of other creditors* of the American (p. 69), and thus continue (p. 70):

> "The said meeting of the Board of Directors, on December 21, 1895, was held and said resolution adopted at such meeting and said agreement signed and delivered, and said assets delivered, and said notes signed and delivered *without the knowledge or consent* of these defendants, or either of them.
>
> "And these defendants further, severally answering, say, that no proceedings have been had at law upon the three notes above mentioned, or either of them, and that said plaintiff has not reduced his said claim founded upon the note set out in his amended bill *to judgment* in any court."

The joint and several answer of appellants in No. 19,652, Henry F. Wyman and three others, (p. 46), was filed February 4, 1901, but was so nearly like the answer of Peter Frenzer, et al., that it does not seem necessary to summarize it. We mention differences later.

To these two answers and, indeed, to all the answers of all answering defendants, the complainant filed one general replication on August 2, 1901. (P. 121.)

On August 2, 1901, the Union filed an answer alleging

that it held the two notes before mentioned (p. 118); "that no part of said notes has been paid except the interest on each of said notes has been paid to March 23, 1897;" that it (p. 120) claims "all of the benefits arising and accruing from and by virtue of said agreement." *No process* was issued upon this answer and *no notice* to appellants given.

On July 1, 1902, the complainant pressing for a hearing, the cause was argued to the Circuit Court and submitted on the proofs and taken under advisement. (P. 122.)

On September 1, 1902, the court concluded that the assets of the American must be disposed of before the question of the individual liability of the shareholders could be adjudicated (p. 123), and ordered the same to be done by James Burness, who had been appointed to succeed Kimball *as trustee named in the Agreement*. Burness sold the same to the Union and his action was confirmed on December 9, 1902. (P. 123.)

On January 3, 1903, the final report of the trustee was approved, except with respect to a portion of the fees charged by the trustee, and these were disallowed because he had been in the employ of the Union while acting as trustee.

On April 24, 1903, a "Memorandum Opinion" upon the merits of the cause was filed and appears at page 126 of the printed record and will be hereinafter more particularly referred to.

On the 23rd day of May, 1903, a decree (Record, p. 130) was entered in accordance with the Memorandum Opinion, finding the balance due complainant upon his note to be $46,524.83, the balance due the Union upon its two notes to be $147,941.52, and the amount due upon each $100 share of the stock held by the several defendants to be $97.23; and adjudging that complainant and the Union have and recover from the American and from each of its shareholders the amounts respectively due them upon this basis.

The amounts adjudged due complainants and the Union respectively were as follows, to-wit: From Henry Wyman $1,354.89 and $4,308.75; from Morris Levy $1,163.00 and $3,698.50; from Peter Frenzer $348.90 and $1,109.55; from Howard R. Smith $1,163.00 and $3,698.50; and from George G. Wallace $1,744.50 and $5,547.75.

Thereupon petitions for appeal (p. 314) and assignments of error (p. 316) were filed, the appeals were duly allowed by the court (p. 323), bonds were given and duly approved by the court (pp. 324-336), a præcipe for a transcript (p. 340) of the record was served and filed on June 12, 1903, and the record was filed in the Circuit Court of Appeals on July 20, 1903.

The decree of the Circuit Court was affirmed by the Circuit Court of Appeals on December 8, 1904 (pp. 390, 400, 410) and these appellants severally prayed an appeal (pp. 401, 411) and asigned errors (pp. 403, 412), and their appeals were allowed on February 6, 1905, (pp. 408, 420), and the record duly filed in this court on March 13, 1905.

The following errors were assigned and are now relied upon to-wit:

ASSIGNMENT AND SPECIFICATION OF ERRORS.

1. That the Circuit Court of Appeals erred in its decree in holding it was not essential to the maintenance of the suit in the court below (to-wit: in the said Circuit Court for the District of Nebraska) that the complainant (Sumner Waliace) should have first reduced his demand to judgment.

2. That the Circuit Court of Appeals erred in its decree affirming the decree and judgment of the Circuit Court for the District of Nebraska; that is to say, in holding that the suit is one to wind up the affairs of a national bank and a suit arising under the laws of the United States of which the Circuit Court had jurisdiction.

3. That the Circuit Court of Appeals erred in its interpretation of the contract of December 21, 1895, between the American National Bank and the Union National Bank, and in holding the same to be merely a contract by which "the Union National Bank assumed the payment of the liabilities of the American National to its depositors and on account of bills payable, and in return was to receive its cash, cash items and such bills receivable as the former was willing to accept at par and without recourse. The difference between the aggregate of amounts so received, and the gross amount of liabilities assumed was to be represented by three non-negotiable promissory notes of the American National, the payment of which was to be secured by the pledge of all its remaining assets to Thomas L. Kimball as trustee," which erroneous interpretation was material to the final conclusion of the Court.

4. That the Circuit Court of Appeals erred in holding that the contract of December 21, 1895, between the American National Bank and the Union National Bank, had been ratified by the shareholders of the American National Bank, and that the individual liability of the shareholders under section 5151 of the Revised Statutes of the United States might, therefore, be enforced.

5. That the Circuit Court of Appeals erred in holding that the compainant, Sumner Wallace, and the Union National Bank could go behind the contract of December 21, 1895, and that their claims were, in equity for the "contracts, debts and engagements," of the American National Bank, for which shareholders are made individually liable, under section 5151 of the Revised Statutes.

Upon the the pleadings and proofs there are four broad questions for solution in this cause, to-wit:

1. Had the United States Circuit Court for the District

of Nebraska jurisdiction by reason either of the nature of the cause of action or of the citizenship of the parties?

2. Was the nature of the transaction between the officers of the American and the Union such that the American is not liable for any deficit unpaid upon either of the three notes issued in its name by such officers? If it is not liable, of course, these appellants are not liable.

3. Was that transaction of such a nature that these appellants as shareholders of the American are not liable for that deficit, even though the bank itself may be?

4. If the shareholders of the American are for any reason not liable *at law* for such deficit, are these appellants liable therefore *in equity* for the reason that they had acquiesced in or ratified such action?

BRIEF.

I.

The Circuit Court of the United States did not have and should not have assumed jurisdiction to try this cause and render a decree against these appellants.

A.

The Court did not have jurisdiction on the ground of citizenship, because complainant is the assignee of a non-negotiable chose in action and his assignor, the Union National, is a bank located in the state of Nebraska, while the American National, Kimball and these appellants were also citizens of the state of Nebraska.

Wilson vs. Knox Co., 43 Fed. 481.

Parker v. Armsby, 141 U. S. 81 (1891.)

Mexican Nat. R. R. Co. v. Davidson, 157 U. S. 201, (1895.)

Cloud v. City of Sumas, 32 Fed. Rep. 177 (1892.)

B.

The Court did not have jurisdiction under section 2 of the Act of June 30, 1876.

1. Because the American did not go into voluntary liquidation within the meaning and purpose of the United States banking laws.

2. Because complainant has not filed "a bill in the nature of a creditors' bill" as required by said section.

3. Because the American National and its shareholders have been denied the right to have the validity of the note sued on determined in the proper Court before a jury, as provided by the Seventh Amendment to the Constitution of the United States and by Section VI of Article 1 of the Constitution of Nebraska.

4. Because the bringing of an action by any one not a judgment creditor conflicts with the provisions of the United States banking laws under which there are only two methods of liquidating the affairs of a national bank—one by the Comptroller and the other under Section 5220.

5. Because the failure of Congress to provide in Section 2 that a national bank should be made a party defendant, indicates that the action in said section was intended to be simply ancillary to a prior proceeding at law.

6. Because the complainant did not and could not, owing to the peculiar nature of the case, bring an action in behalf "of the other creditors of the Association."

C.

The Court did not have jurisdiction under Section 1 of the Act of March 3, 1887, as corrected by the Act of August 13, 1888, because the bill did not present a suit "arising under the laws of the United States."

D.

The Court did not have jurisdiction under Section 4 of the Act of March 3, 1887 as corrected by the Act of August 13, 1888, for the following reasons:

1. An action to wind up the affairs of a national bank must be brought by an "officer" or "agent" of the United States.

2. This action was not in fact one to wind up the affairs of a national bank; and

3. The bill did not state facts sufficient to sustain this action as one to wind up the affairs of the American National.

II.

The American National was not obligated to make good any deficiency remaining after the exhaustion of its assets in the hands of the Union National and Kimball, and hence appellants were not liable therefor as shareholders.

The Circuit Court (but not the Court of Appeals) proceeded upon the theory that the borrowing of money is one of the incidents in the ordinary course of the business of banking, and that there was a simple borrowing of money by the American from the Union. But an analysis of the cases in the Federal Courts involving the power of national banks to borrow money show these facts; (1) that the moneys were loaned by banks in good faith in the usual course of the business of banking; (2) that the moneys were borrowed in the usual course of the business of banking; (3) that the moneys so borrowed were actually paid out by the borrowing bank in the usual course of the business of banking, or if not actually so paid out, then the loaning banks had no knowledge of the diversion thereof and were not parties thereto. And those cases establish these two propositions: (1) that the power to borrow money is an incidental power and is limited to occasions when borrowing is "necessary to carry on the business of banking"; and (2) that

all borrowing must be of a temporary nature.

The cases so analyzed are the following:

First Nat. Bank v. Nat. Exch. Bank, 92 U. S. 122 (1876.)

Western Nat. Bank v. Armstrong, 152 U. S. 346, 351, (1894)

U. S. Nat. Bank v. First Nat.-Bank, 27 U. S. App. 605 (1894) and 49 U. S. App 67 (1897.)

Auten vs. U. S. Nat. Bank, v74 U. S. 125 (1899).

Stapleton v. Stockton, 91 Fed. 326 (1899.)

Ditty v. Dominion Nat .Bank, 75 Fed. 769 (1896.)

Aldrich v. Chemical Nat. Bank, 176 U. S. 618 (1900.)

But the situation of the two banks and the nature of the transaction and the natural and inevitable results of the transaction were such as to show that the transaction *in toto* was not a simple borrowing of money but was not only (1) beyond the powers of the Board of Directors acting alone, but (2) ultra vires the American National itself.

1. For directors have no power to perform acts not within the ordinary business of the corporation.

Chicago City Ry. Co. v. Allerton, 85 U. S. 233 (1874.)

If, as held in *Roberts v. Hill,* 24 Fed. 571 (1885), a national bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will *presently* be unable to meet its obligations, the Comptroller should have been notified and the shareholders of the bank would, under Section 5205, have then been by him given the option either to continue the business of the bank by making good its capital stock, or to submit to liquidation under the supervision of the Comptroller.

If, on the other hand, (*Case vs. Citizens Bank,* 2 Woods, 23, 1878), a bank is insolvent only when it is unable to meet the

demands *actually* made upon it, then the circumtances did not authorize tht directors to take the action they did; and the condition of the American was well known to the officers of the Union.

2. Corporations (including national banks) have such powers and such powers only as are expressly or impliedly conferred upon them, and any act which is not within the powers so conferred is impliedly prohibited.

Germania, etc Co. vs. Boynton, 71 Fed. 797, 801 (1896); 37 U. S. App. 602.

Central Trans. Co. vs. P. P. C. Co., 139 U. S. 24 (1890).

Cal. Nat. Bank vs. Kennedy, 167 U. S. 362, 366 (1897).

1. The power to enter into this transaction, if existing, must be an incidental power, as it is not expressly conferred.

2. The incidental powers of national banks are defined and limited in and by Section 5136 U. S. Revised Statutes and do not authorize a transaction such as the one between the banks.

3. The power to enter into such a transaction is impliedly denied by the general trend of the laws governing national banks and the object such laws have in view.

4. The power to enter into such a transaction is impliedly prohibited by the following provisions of the banking laws of the United States, to-wit: Sections 5145 and 5147, 5133, 5137, 5202, 5222, 5230, 5153 and 5497, and 5146.

5. The power to enter into such a transaction is expressly prohibted by Section 5242.

National banks are public corporations and the banking laws governing them are complete in themselves, provide expressly when and by whom a bank shall be liquidated, and exclude all other methods.

National Bank vs. U. S., 107 U. S. 445 (1883).
In re Mfgrs. Nat. Bank, 5 Biss, 499 (1873.)
First Nat. Bank vs. Colby, 88 U. S. 609 (1875.)
Hunt vs. American, etc., Co., 81 Fed. Rep. 532 (1897.)
Bank Commissioners vs. The Bank of Brest, 1 Harr. Ch. (Mich.) 106-111-112.

Assuming, *arguendo*, that the transaction in the case at bar is one where a contract had been executed on one side only, the Supreme Court holds that the fact a contract had been executed by one party and the other party has received the benefit thereof, does not give the contract validity, and further holds that no action will lie on the contract and that stockholders of a bank may show the nature of the transaction, i. e., that it was not such as to impose any liability upon them.

Pearce vs. Madison, etc., 66 U. S. 441 (1859).
Central Trans. Co. vs. P. P. C. Co., 139 U. S. 24 (1891).
Louisville, etc. vs. Louisville, etc., 174 U. S. 552, 567 (1899).
O'Brien vs. Whelock, 184 U. S. 450, 490 (1902).
Whitman vs. Nat Bank, 176 U. S. 559 (1900).
Ward vs. Joslin, 186 U. S. 142 (1902).

III.

The liability of shareholders in national banks is a restricted liability and the transaction between the banks was of such a nature that appellants are not liable for any deficit arising therefrom.

Section 5151 U. S. Revised Statutes is the only provision imposing liability upon shareholders of national banks; and the following cases show, (1) that the liability imposed upon shareholders by Section 5151 is a means of securing the pay-

ment of a bank's debts *at the time* when it is no longer able to continue business; (2) that the purpose of the section is to secure the *effectual winding up* of the bank's affairs; (3) that such liability cannot be *prolonged;* and (4) that there can be no liability on the part of shareholders *unless* the contracts, debts and engagements of the bank have been contracted (a) duly, and (b) in the ordinary course of the business of banking. They further show that the fact, that the new obligation *takes the place* of an old obligation for which the shareholders may have been liable, does not make them liable for such new obligation.

Richmond vs. Irons, 121 U. S. 27 (1887).
Schrader vs. Mfgrs. Nat. Bank, 133 U. S. 67 (1890).
Ward vs. Joslin, 186 U. S. 142, 152 (1902).

The "business of banking" is defined in *Mercantile Nat. Bank,* 121 U. S. 138 (1887), and the transaction between the two banks does not fall under that definition.

But the debt represented by the note sued on was not duly contracted because the transaction was *ultra vires* not only the Board of Directors but the bank itself, and because the debt was not incurred in the ordinary course of the business of banking, and because the transaction was such as to increase and prolong the liability of the shareholders as it existed on Dec. 21-23, 1895.

Such a transaction and the debt arising therefrom cannot be said to have been within the "legal contemplation" of the shareholders of the American at the time they purchased the shares held by them.

IV.

That appellants have not done anything to estop them to deny their liability to make good the balance remaining unpaid upon the notes.

Assuming, *arguendo*, that a contract *ultra vires* a corporation *can* be rendered enforceable against its shareholders by the principle of estoppel, we contend,

1. Ratification by implication is founded upon estoppel and the doctrines of estoppel can be applied only to persons individually, not en masse. No official action was taken by the shareholders in meeting assembled and none of these appellants did or failed to do anything from which ratification could be implied. Their silence could not affect their rights, as the duty to speak was not imposed on them. Nor would protest or action have benefited either them or the Union. They received no benefits from the transaction but if they had, the benefits were not the result of their desire or their action.

2. There was no express ratification such as could give validity to the original transaction, because the shareholders signed Exhibit 25 individually. Nor does that paper, which was signed by some shareholders only, impose any new contractual liability upon them. Nor does it estop them, because it was not intended to do so and was not an inducement to the Union to change its position.

Scovil vs. Thaer, 105 U. S. 143 (1882).
Thomas vs. West Jersey R. R. Co., 101 U. S. 71 (1880).
Bloomfield vs. Charter Oak Nat. Bank, 121 U. S. 121, 135 (1887).
Mutual Life Ins. Co. vs. Mowry, 96 U. S. 544, 547 (1878).

But a contract *ultra vires* a corporation *cannot* be rendered enforceable against its shareholders by ratification or by estoppel.

Central Trans. Co. vs. P. P. C. Co., 139 U. S. 24 (1891).
Cal. Nat. Bank vs. Kennedy, 167 U. S. 362 (1897).
First Nat. Bank vs. Conrad, 174 U. S. 364, 372 (1889).

Ward vs. Joslin, 186 U. S. 142, 151 (1902).

To hold that the notes represented contracts, debts and engagements of the American for which its shareholders were liable and that for that reason the Union should recover against appellants, would be to overrule in effect the cases cited last above. Again, such a conclusion

1. Is not based upon any averment in the bill or the amended bill.

2. Is opposed to *Richmond vs. Irons, Schrader vs. Mfrgs. Nat. Bank* and *Ward vs. Joslin, ante.*

3. Would deprive the shareholders of their right to contest their liability for such claims.

The transaction was an entirely new deal and the Union was under no prior oblibation to pay the debts of the American and was a volunteer.

Aetna Life Ins. Co. vs. Middleport, 124 U. S. 548 (1888).

ARGUMENT.

I.

THAT THE CIRCUIT COURT OF THE UNITED STATES DID NOT HAVE AND SHOULD NOT HAVE ASSUMED JURISDICTION TO TRY THIS CASE AND ENTER A DECREE AGAINST THESE APPELLANTS.

A.

Complainant is the assignee of a non-negotiable *chose in action* and his assignor (the Union National) is a bank located in the state of Nebraska. Therefore, his citizenship is of that state, and the American and Kimball (Trustee under the Agreement) and these appellants are also citizens of that state. If, then, complainant had appealed to the *general* equity jurisdic-

tion of the United States Circuit Court, he would have failed because that court had no jurisdiction.

Wilson vs. Knox Co., 43 Fed. 481, opinion by Miller, Justice, and Caldwell, Judge; *Parker vs. Armby*, 141 U. S. 81 (1891); *Mexican Nat. R. R. Co. vs. Davidson*, 157 U. S. 201 (1895); *Cloud vs. City of Sumas*, 52 Fed. Rep. 177 (1892).

B.

The allegations of the original bill (Record, p. 7) and of the amended bill (p. 28) and the two opinions of the Circuit Court (p. 12 and p. 126) show that the right of that Court to assume jurisdiction was based by that court and by complainant *solely* upon Section 2 of the Act of Congress of June 30, 1876 (Supp. U. S. Rev. Stats., 217). The opinion of the Court of Appeals bases it upon this ground and also (Record, p. 395), upon the Act of August 13, 1888—which Act we consider later.

Section 2 of the Act of June 30, 1876 (assuming for the present that said section has not been repealed and is still in full force) provides as follows:

> "That *when* any national banking association shall have gone into *voluntary liquidation* under the provisions of section fifty-two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-two hundred and fifty-one of said statute may be enforced by any creditor of such association by bill in equity *in the nature of a creditors'* bill, brought by such creditor in behalf of himself *and all of the other creditors* of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

It is a familiar rule that one who seeks the benefit of a particular statute must show himself and his cause of action to be strictly within the terms thereof. This has not been done by complainant.

1. The American did not go into volutary liquidation within the meaning and purpose of the United States banking laws. The word "liquidation," used in said Sec. 2 and in Sec. 5220, Rev. Stats., has a definite meaning and *presupposes* the existence of assets to be liquidated in the manner provided. But there remained under the control of the American or of its directors nothing to liquidate. *All* the assets of the American had been turned over to the Union and Kimball, for them to collect and apply to the payment of the three notes, and they had proceeded to do this and were *still engaged in the process of liquidation* at the time the vote was taken

2. Again, the complainant has not filed "a bill in the nature of a creditor's bill," as positively required by said Sec. 2; for neither of his bills allege and his proof does not show, any action at law upon his note. But a creditors' bill presupposes two things; (1), that the creditor has been able to establish his claim to be a valid and honest claim before the proper court at law; and (2), that he needs the assistance of a court of equity in order to realize upon it. This is illustrated by *Jones vs. Green*, 68 U. S. 330 (1883), and *Smith vs. R. R. Co.*, 99 U. S. 398 (1878), and *Scott vs. Neely*, 140 U S. 106 (1891), and *Nat. Tube Works Co. vs Ballou*, 140 U. S. 517 (1892), and many other cases, including *Hollins vs. Brierfield C.* N *I. Co.*, 150 U. S. 371 (1893.) This is the latest expression of the Supreme Court and it therein reviews its former decisions (overruling some, distinguishing others, affirming others), and lays down the rule clearly and emphatically. Even if the fact that an execution would be fruitless, might be held to excuse the formal issuance of an execution in some instances, it would not excuse the failure to prove the validity of the claim in a court at law. Some courts execuse an execution, while insisting upon a judgment.

It is not a "creditors' Bill," unless there is a judgment

and, added thereto, the necessity (however this may be shown in evidence) of an appeal to equity to enforce it. It does not seem an answer in the particular case at bar to say, as the Court of Appeals apparently does in effect say, that because complainant has a lien and can go into *some* equity court of *general* jurisdiction without alleging a prior judgment and execution thereon, therefore he was entitled to relief in the Circuit Court below. For the Circuit Court has a strictly prescribed jurisdiction, and if complainant is to enter that court by the door of Section 2, he must comply with the terms of Sec. 2. The question seems simply to be, What did Congress *mean* by the words "Creditors' Bill"? And that section does not say, for instance, that any creditor may file a "bill in equity in the nature of a bill to foreclose a mortgage," or a "bill in equity in the nature of a bill to establish and declare a trust," or a "bill in equity in the nature of a bill to foreclose a lien," or a "bill the "nature of" anything else than a creditors' bill.

But complainant also argued and apparently the courts below (Record pp. 12 and 396) were of the opinion, that the words "any creditor," were the ruling words, and were not in any degree limited by the words "creditors' bill." But such construction would eliminate a portion of the section itself—which is contrary to the rule that all portions of an act of Congress must be given effect, if possible. For Sec. 2, thus interpreted, would read, "the individual liability of the shareholders * * * * may be enforced by any creditor (i. e., any person claiming to be a creditor) of such association by filing a bill in equity." But the words "in the nature of a creditors' bill" are a part of the section in fact, have a well defined meaning in law, and add an element otherwise wanting in the Act.

The construction for which we contend gives a meaning to all the words of the Act, conforms with the equitable remedies

and procedure existing at the time of its passage and deprives neither shareholders nor creditors of any rights or remedies.

But let us consider some other reasons why complainant's construction cannot be the correct one.

3. It has deprived the American and its shareholders of their right to have the validity of the note sued on determined in the proper court and before a jury. This right to a jury trial is preserved by the Seventh Amendment to the Constitution of the United States, and by Sec. VI of Art. I of the Constitution of Nebraska (which provides: "The right of trial by jury shall remain inviolate") and has been jealously guarded by the United States Supreme Court, as illustrated in *Cates vs. Allen*, 194 U. S. (1893), and *Scott vs. Neely*, 140 U. S. 106 (1891).

4. Complainant's contention is inconsistent with other provisions of the United States banking laws. Under the general banking laws of the United States there are only two methods of liquidating the affairs of a national bank and, as national banks are organized and operated under such laws, all persons dealing with them are bound to know, and are held conclusively to consent to, the conditions under which they do business and the statutory provisions under which their affairs will be liquidated.

One of these methods is for the Comptroller to appoint a receiver. The other method is under Sec. 5220 of the Revised Statutes, which provides that a bank may go into voluntary liquidation by the vote of its shareholders owning two-thirds of its stock.

The existence of a bank continues after it has gone into voluntary liquidation, *Central Nat. Bank vs. Conn. Mut. L. Ins. Co.*, 104 U. S. 54, 73 (1881), and *Chemical Nat. Bank vs. Hartford Deposit Co.*, 161 U. S. 1, 8 (1896)—and Sec. 5221 provides for the publication of a notice to creditors to present their claims to the bank. This provision is to enable the bank

to pay just claims without further expense. And the existence of the corporation is continued for the purpose of giving, on the one hand, creditors, the validity of whose claims are denied, access to a court of law, that they may there assert their claims; and of enabling on the other hand, a bank, which denies the validity of a claim presented against it, an opportunity to contest the same in a court of law.

But as the second means (to-wit: voluntary liquidation), might be abused through the dishonesty or incompetency of the bank's officials and the equal distribution of the assets among all creditors be delayed or evaded, Congress added the second section of said Act of 1876—the section under consideration. But Congress did not mean that any person *claiming to be a creditor* could *ipso facto deprive* the stockholders of their right to a voluntary liquidation under Section 5220 of the Statutes. Indeed, the assets of a national bank might be abundant and the Comptroller, after a thorough examination of the affairs of the bank, might determine that a voluntary liquidation under Sec. 5220 would be best not only for the stockholders but for the government and all creditors, yet (according to the theory of complainant) any person claiming to be a creditor, no matter how small might be the amount of his claim or how unjust might be his claim in fact, could force its assets into the hands of a receiver, force such assets to a speedy and ruinous liquidation and inflict, certainly upon its shareholders and perhap upon it creditors, great loss and unnecessary court costs and receiver's expenses. In order to prevent an action of this kind and in order to assure the court that the creditor's claim is a just one, Sec. 2 provides that the bill filed by him must be "in the nature of a creditors' bill;" that is, he must at least show that his claim has been adjudicated by some court of competent jurisdiction after due investigation.

It is very suggestive in this connection, that complainant's

counsel are *unable to cite a single case* in the reports where there has been an attempt to bring an action under said Sec. 2 by any one who had *not* secured a judgment at law against a bank and had had an execution issued and returned unsatisfied. See for instance, *Richmond vs. Irons, post.*

5. Again, as the assets of a national bank must be exhausted before the secondary liability of its shareholders can be enforced, it is remarkable that Congress did not provide in said section that a bank should be joined with its shareholders as a party defendant. That which a legislature does not say often shows its intention as clearly as that which it does say.

As Congress did not provide that a bank should be joined as a party defendant, it would be necessary that the court should have jurisdiction over the American under some other Act of Congress if it was made a defendant, and this it did not have.

6. Again, Section 2 provides that the action shall be "brought by *such* creditor (i. e., one who can file a bill "in the nature of a creditors' bill") on behalf of himself *and all other creditors of the association.*" But how can the complainant be said to file a bill *in behalf of other creditors,* when he claims in his bill to have a lien upon *all* the assets of the bank, asserts that these assets are in possession of his assignor for the purpose of liquidation but while still unliquidated and unappplied are *insufficient* to pay their combined liens, and prays that the proceeds thereof be applied *exclusively* toward the payment of his and his assignor's claim? And it is worthy of note in this connection that the contract of the Union, his assignor, was to assume *only* the liabilities of the American "to its depositors and on account of its bills payable" (Par. second, Exhibit 1, p. 250.)

7. Again, Section 5221 expressly provides *as a part of the procedure* of involuntary liquidation for notice to creditors,

"To present the notes and other claims against the Association for payment," and the unavoidable inference from this is, that it is the duty of creditors to present their claims. But neither the bill nor the amended bill allege such presentation of either of the three notes.

For these reasons, it would seem that Congress by the Act of June 30, 1876, did not intend to subvert the usual requirements of, and procedure in, the Courts of Equity of the United States, but did intend simply to open the doors of such courts to judgment creditors, who otherwise might have been debarred therefrom by reason of being citizens of the same state as the bank against which they sought the aid of a court of equity.

C AND D.

But the Circuit Court of Appeals said (Record, p. 395), "A broader and more satisfactory ground may be found in the provisions of the Act of August 13, 1888" upon which to support the jurisdiction of the Circuit Court, and held that complainant's cause of action arose under the laws of the United States and, also, that the action itself was one brought to wind up the affairs of a national bank.

The question whether Section 2 of the Act of June 30, 1876, had not been repealed by Section 6 of the Act of March 3, 1887, as corrected by the Act of August 13, 1888; and the question whether under Section 4 of the Act of August 13, 1888, the jurisdiction of Circuit Courts in "cases for winding up the affairs" of any national bank is not limited exclusively to suits commenced by "officers" or "agents" of the United States; and the question whether the bill presents a case "arising under the laws of the United States" have all been so carefully and ably presented in the brief filed by Mr. W. W. Morsman in *Morsman vs. Wallace et al.*, Trial No. 193, that it is unnecessary to discuss them further here.

But it may not be out of place to consider whether the Court of Appeals has not misconstrued the nature of this action in holding it to be one to "wind up" the affairs of the American. Was it in reality anything more than a suit to foreclose a lien and to secure a deficiency judgment against the American and also, incidently, against its shareholders? It would seem not; for there were in fact, and the bill so alleges, no assets in control of the American—no affairs to be wound up. But even had there been; has a simple contract creditor, whether possessing a lien or not, inherently any right to ask that the affairs of a bank organized under the laws of the United States shall be wound up for his benefit, and particularly has he such right before he has exhausted his lien *according to the terms of the contract creating it?*

In this connection and to further illustrate the peculiar nature of this suit, we desire to call attention to several matters, bearing in mind that the Court of Appeals bases the jurisdiction of the Circuit Court upon the right of complainant to bring an action "to wind up" the affairs of the American and considers his right to a judgment for deficiency against its shareholders merely as ancillary and incidental thereto.

In the first place, complainant, while alleging the American to have gone into voluntary liquidation under Sections 5220 and 5221, does not allege that its funds were being fraudulently diverted from the *cestuis que trustent.* In fact, the only ground upon which complainant could appeal to the general powers of a court of equity, was that he claimed a lien upon certain assets, which he wished to have sold under the authority of the Court. But his assignor had agreed (Record, p. 251), "to liquidate" those assets "without charge or expense" to the American "except such court charges and attorney's fees as may be found necessary." "To liquidate" meant to collect or sell, and apply the proceeds; and the court charges and at-

torney's fees were to be those incurred in doing that. But by this action the expenses of the liquidation since the filing of the bill have been imposed upon by the American and its shareholders. Again, complainant, while maintaining the validity of the Agreement between the banks and the authority of the Union and Kimball to dispose of the assets of the American and apply the proceeds thereof to the payment of the three notes (as of necessity complainant must do), does not allege that Kimball had not proceeded and was not then proceeding honestly, speedily and with excellent judgment to convert such assets into funds for the purpose of paying off such notes in accordance with the Agreement under which such notes were executed and such security delivered. There was no excuse for complainant calling for the assistance of a court of equity, unless he alleged that Kimball had been guilty of gross negligence or mismanagement, or had refused to dispose of the assets in his hands as such trustee and to apply the proceeds as the Agreement provided. Nor does complainant allege or prove that he has called upon Kimball, as trustee, for an accounting, and that Kimball has refused to render an account. Nor does complainant show any necessity for the appointment of a receiver or pray for the appointment of one. But is it not difficult to conceive of a "winding up" of the affairs of a corporation, when there is no necessity for the court to have the assistance of a receiver to collect, preserve and finally sell the assets of that corporation? The terms of the Agreement determined and fixed the powers, duties and rights of the Union, the American and the trustee. As Kimball afterwards became and continued to be a director of the Union, he certainly was friendly to the Union. But instead of requesting him to hasten the sale of the remaining assets of the American, the Union ignored the terms of the Agreement and its own obligation "to liquidate" the assets of the American

and caused this suit to be brought. Even the amended bill not only shows no need to appeal to a court of equity but, on the contrary, shows on its face an evasion of the terms of the Agreement upon which complainant relies.

II.

THAT EVEN THE AMERICAN NATIONAL WAS NOT OBLIGATED TO MAKE GOOD ANY DEFICIENCY REMAINING AFTER THE EXHAUSTION OF ITS ASSETS IN THE HANDS OF THE UNION NATIONAL AND KIMBALL; AND HENCE APPELLANTS WERE NOT LIABLE THEREFOR AS SHAREHOLDERS.

The Court of Appeals said (p. 398), "It is contended that in making the contract, executing the notes and transferring its assets the American National transcended its corporate powers and that no debt was thereby created which could be enforced against its shareholders. *Ward vs. Joslin*, 186 U. S. 142. We may, at the outset, *omit any consideration* of what might be the case were these transactions dependent alone upon the authority of the officers and board of directors of the bank, for the evidence shows clearly that what was done by them was ratified and confirmed by the shareholders." We discuss the matter of ratification and confirmation later. But the complainant and the Circuit Court proceeded upon the theory that the borrowing of money is one of the incidents in the ordinary course of the business of banking; that there was a *simple* borrowing of money by the American from the Union; and that the liability thus assumed by the American *ipso facto* should fall upon its shareholders. It seems, then, desirable at the outset to analyze the authorities cited by complainant and relied upon by the Circuit Court, adding two or three which show the history of or tend to throw light upon these authorities.

First National Bank vs. Nat'l. Exchange Bank, 92 U. S. 122 (1876); 23 Law. Ed. 679.

This case involved the question whether a national bank could take stocks in railroad and other corporations to compromise a doubtful debt owing to the bank. In its opinion by Mr. Chief Justice Waite, the court, in construing section 5136, R. S., said (p. 127):

> "Authority is thus given to transact such a banking business *as is specified*, and all incidental powers *necessary to carry it on* are granted. These powers are such as are required to meet all the legitimate demands of the authorized *business*, and to enable a bank *to conduct its affairs*, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities *in the regular course of its business*, as well as to become the creditor of others."

This was quoted with approval in *Western Nat'l Bank vs. Armstrong*, 152 U. S. 346, 351 (1894); 38 Law. Ed. 470, and to this the court added: "Nor do we doubt that a bank, in certain circumstances, may become a *temporary* borrower of money." Thus far there seems no doubt; but in the latter case the court proceeded to say that a *temporary* borrowing of money "would be so much out of the ordinary course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money" (p. 351), and this proposition has not been approved in the two cases in the Supreme Court hereinafter cited.

U. S. Nat'l Bank vs. First Nat'l Bank, 27 U. S. App. 605 (1894), and 49 U. S. App. 67 (1897).

The question in this case was whether the United States National Bank of New York, which had discounted notes for the First National Bank of Little Rock, Ark., *was chargeable*

with notice that the president of the First National Bank had procured the discount for his own personal benefit and not for the benefit of his bank. In the 49 U. S. Appeals (70 Fed. Rep. 298), the court, in its opinion by Thayer, Circuit Judge, in discussing the question whether rediscounting is outside of the sphere of ordinary banking, says (p. 301):

> "It is the duty of banks to make all reasonable efforts to supply their customers with money for all legitimate business purposes. *To that end* it is their right to exercise all of their corporate powers, including the power to rediscount. On some occasions, if this latter power was not freely and speedily exercised, a bank would be derelict in the discharge of its obligations to the public. One of the most useful functions which banks perform is to equalize the distribution of money, and make the supply in their respective localities satisfy, as far as possible, the demands of trade and commerce, by withdrawing money, as occasion requires, from those financial centers where it has a tendency to accumulate. It is obvious that this function can be best performed by banks by selling or rediscounting a portion of their bills receivable in those places where money is most abundant and cheap; and we have no doubt that it is usually so performed, and that many banks throughout the country are in the habit, at certain seasons of the year, of replenishing their stock of money by such means."

The court then points out the fact that the rediscount was made with its regular correspondent and in accordance with its regular habit. This case was taken to the United States Supreme Court and there appears as *Auten vs. U. S. Nat'l Bank*, 174 U. S. 125 (1899); 43 Law. Ed. 920.

The court said through Mr. Justice McKenna (p. 143):

> "The very object of banking is to aid the operation of the laws of commerce by serving as a channel for carrying money from place to place, as the rise and fall of supply and demand require, and it may be done by rediscounting the bank's paper or by some other form of borrowing. *Curtis vs. Leavitt*, 15 N. Y. 1; *First National Bank vs. National Exchange Bank*, 92 U. S. 122 (23; 679); *Cooper vs. Curtis*, 30 Me 488.

A power so useful cannot be said to be illegitimate, and declared as a matter of law to be out of *the usual course of business,* and to charge everybody connected with it with knowledge that it may be in excess of authority. It would seem, if doubtful at all, more like a question of fact, to be resolved in the particular case of the usage of the parties or the usage of communities."

The court then reviews the testimony and concludes:

"This testimony certainly has a very comprehensive scope, and there is no contradiction of it. It must be received, at least, as establishing that, as between the contending banks rediscounting paper was in the usual course of their business, and that besides it was the usual course of business in their respective localities. *Therefore,* the discounting of notes in controversy carried the sanction of such business."

Stapleton vs. Stockton, 91 Fed. 326 (1899), was cited by complainant in his argument. The Merchants National Bank of Ocala borrowed $15,000 from innocent parties while in daily operation and gave security therefor, and the $15,000.00 was used up "*in the regular operations of the bank.*" (P. 330.) As McCormick, Circuit Judge, says, (p. 330), the issue was one wholly between sreditors. The court held that the transaction was not a preference or a fraud on creditors under Sec. 5242 of the Revised Statutes.

Ditty vs. Dominion Nat. Bank, 75 Fed. 769 (1896) was also cited by complainant. This was a case where the president of the Citizens Nat. Bank borrowed $5,000.00 from the Dominion Nat. Bank in the ordinary course of the business of the Dominion National and the amount so borrowed was used in the ordinary course of the business of the Citizens National. The fact that this particular sum was borrowed for the purpose of replacing money embezzled by the president of the Citizens National prior to that time, was held not to affect the right of the Dominion National to recover, *because it had no knowledge*

thereof, and not to excuse the Citizens National from its obligation to repay the same, because it could not "retain it without assuming the burden of the president's knowledge as to how it came to be obtained."

Armstrong vs. Chemical National Bank, 54 U. S. App. 462, 83 Fed. Rep 556 (1899), was appealed to the Supreme Court and appears there as *Aldrich vs. Chemical Nat'l Bank*, 176 U. S. 618; 44 Law. Ed. 611. (1900.)

In this case the Chemical National was the New York correspondent of the Fidelity National of Cincinnati, Ohio, and with it the latter kept its, or a large part of its, reserve. Harper, as vice president of the Fidelity, sent to the Chemical its certificate of deposit and 27 notes as collateral, and the Chemical credited the account of the Fidelity with $300,000.00 (p. 628), and that credit was fully exhausted by the checks of the Fidelity bank drawn *"in the ordinary course of its business."* (P. 636.) But Harper, through manipulations in the Fidelity bank at Cincinnati, appropriated to his own use an equal amount.

The court says (p. 627):

> "In the view we take of the present case it is not necessary to extend this opinion by a review of the numerous authorities which, it is contended, support the general proposition that a national bank is entitled under the law of its creation and *in the conduct of its business* to borrow money, and that the lender is not obliged to show that the officer or agent acting for the bank had special authority to negotiate the loan."

And continues (p. 628):

> "We have then a case in which a national bank *having used in its business* money which its vice president obtained as a loan to it from another national bank denies all liability to account for the same upon the ground that the loan was not negotiated by it or by its direction, as well as upon the ground that it could not itself have

legally borrowed the money from the other bank. Do the statutes relating to national banking associations require that such a defense be sustained? This question is recognized by the court as one of great importance, and has received careful consideration in the light of adjudged cases. We proceed to the examination of the cases."

And after such examination, thus concludes on page 635:

"Without further citation of cases we adjudge, both upon principle and authority, that as the money of the Chemical Bank was obtained under a loan negotiated by the vice president of the Fidelity Bank who assumed to represent it in the transaction, and as the Fidelity Bank used the money so obtained *in its banking business* and for its own benefit, the latter bank, having enjoyed the fruits of the transaction, cannot avoid accountability to the New York bank, even if it were true, as contended, that the Fidelity Bank could not consistently, with the law of its creation, have itself borrowed the money."

In regard to these cases it will be observed, (1) that the moneys were loaned by banks in good faith in the usual course of the business of banking; (2) that the moneys were borrowed by banks in the usual course of the business of banking; (3) that the moneys so borrowed were actually paid out by the borrowing bank in the usual course of the business of banking, or if not actually so paid out, then the loaning banks had no knowledge of the diversion thereof and were not parties thereto; (4) that the power to borrow is an incidental power and is limited to occasions when borrowing is "necessary to carry on the business of banking;" and (5) that all borrowing approved was of a temporary nature.

Another case relied upon by the courts below is *Schofield vs. State Nat'l Bank*, 97 Fed. Rep. 282 (1889), 38 C. C. A. 179.

The facts in this case are clearly and fully stated in the opinion of Judge Sanborn and cannot well be summarized. The Union Bank had assumed the debts of the State bank and taken some of its assets as security in 1894. Both banks after-

wards became insolvent and receivers were appointed—whether by the comptroller or otherwise does not appear. Several years after the transaction, the receiver of the Union National brought this action against the State National and offered (p. 285), to return the uncollected securities he held and asked judgment against the State National for the difference between the amount of the debts of that bank, which the Union National had assumed, and the amount which the Union National had realized from the assets, which the State National delivered to it and to the trustee. Judgment was for defendant below and that judgment was affirmed by the Court of Appeals.

From this statement, brief though it is, it appears that the case did not involve the question of the powers of the State Bank or the question of the liability of the State Bank or its stockholders for any deficiency. Hence the court very properly *did not consider* those questions. Upon one question in the case, towit, whether the transaction was *ultra vires* the Union Bank, the court said (p. 287): "This agreement required the Union Bank to do nothing which national banks are not authorized to do—nothing which *they* do not do *in the conduct of the ordinary business of banking*"; that the bank was empowered by Rev. St. Sec. 5136, "to exercise * * * * *all *such* incidental powers as shall be necessary to *carry on the business of banking;*" that the Union Bank had a right to buy office furniture and fixtures and to rent an office and proceed "to occupy and use it to operate its bank;" that it had a right to receive deposits and it did this; that it had a right to discount and purchase paper, and it did this. In other words, what it did, it was authorized to do in *carrying on its business as a bank.* It did not sell its office furniture and fixtures and vacate its office, nor did it end its relations with its correspondents, its depositors and other customers. It did not put it out of its power "to op-

erate its bank." This underlying idea is clearly developed in the third paragraph of the syllabus, which is as follows (p. 283):

> "A contract by a national bank to assume and pay the liabilities of another bank in consideration of the transfer to it by the other bank of its office furniture and lease and its cash and cash assets, and the further assignment to a trustee for its benefit of the bills receivable and securities, is not *ultra vires*, but is within its powers referred by statute *to conduct a general banking business.*"

For these reasons alone, it seems difficult to see how that case has any tendency to sustain the proposition that the transaction in the case at bar was not *ultra vires* the American or was of such a nature as to impose any liability upon the shareholders of the American. But there are also other reasons based upon fact and law which differentiate that case from the case at bar: (1) In that, there was an attempt to rescind an executed agreement; in this, there is an attempt to impose a liability for a deficit arising out of an executed agreement. (2) In that, part of the assets of the State Bank were turned over to the Union; in this, all the assets of the American were turned over to the Union. (3) In that, the shareholders of the State Bank ratified and approved the action of its directors; in this, the shareholders of the American took no action. (4) In that, the selected securities were turned over by the State Bank to McNeil, its president, as trustee, and he proceeded to collect them; in this, the assets of the American were turned over to the Union of Omaha to be liquidated, and it and Kimball proceeded to liquidate them. (5) In that, the agreement left the State Bank (p. 289) *free from liability* to the Union Bank for the money it expended or agreed to expend on account of the debts of the State Bank; in this, the main contention of complainant is, that the Agreement between the American and the

Union left the American and its shareholders *still liable for any deficit.*

Having examined, as we proposed to do, the authorities relied upon by complainant and the courts below, and having determined, as best we could, their scope and bearing, let us point out the salient features of the transaction which took place between the American and the Union—one result of which was the note upon which complainant seeks to recover against these appellants. A *preliminary* question, however, is this:

WHAT WAS THE SITUATION OF THE BANKS BEFORE THE TRANSACTION?

They were both in active operation within a block of each other. They were of about the same size and were active competitors. The object of the officers of the Union was not to come to the rescue of the American or to relieve the American, or to "loan money" to the American. This would have exposed their bank to the danger of a forfeiture of its franchise under U. S. Rev. Stats., Sec. 5200. It was to get rid of a rival bank by buying it up and to secure its business and its superior location The object of the officers of the American, so complainant says, was to avoid probable demands by state, county and city treasurers for funds on deposit; and yet he did not even prove the amount of such deposits. Under the laws of Nebraska, the state, county and city treasurers could not go out of office for weeks after December 21, 1905 (see exhibits B and C respectively, hereto attached in an appendix), while the evidence shows that they or their successors all continued their deposits in the Union. (Mr. Rainey, p. 193.) Thus far the American had paid all demands upon it promptly. Why the need of such haste (the Agreement signed on Saturday and possession on Sunday) that not a single shareholder was consulted? The

regular annual meeting of the shareholders was to occur, and did occur, (p. 258, Exhibit 9), on January 14, 1896. It is incumbent upon complainant, who has the burden of proof, to show to the court the *facts* upon which the officers of the American based their action, if he seeks to justify and rely upon it. He should have proved the statements or actions, if any, of the treasurers which made withdrawals of deposits probable by them; the amounts of such probable withdrawals, whether sufficient to be a serious matter; the efforts of the officers of the American to be prepared to meet such withdrawals in the usual course of business by discounting paper held by the bank or by securing a temporary loan. Instead of this, he relies entirely upon the evidence of Mr. Baird, who acted throughout as the attorney of Minot. Judging from the Agreement, the *apparent* object of the officers of the American was *not to borrow money,* but to sell the bank, close its business, and have its assets liquidated and its debts paid.

But whatever the purpose, apparent or real, this remains: that the American was a going concern and owed the Union nothing.

WHAT WAS THE TRANSACTION?

1. The preamble of the resolution adopted by the Board of Directors of the American on December 21, 1895, says: (Exhibit 7, p. 255.) "Whereas, the officers of this bank and the officers of the Union National Bank of Omaha, Nebraska, have negotiated and agreed upon the *sale* by this bank to the Union National Bank of the *business and assets* of this bank upon the terms and conditions embodied in the agreement, of which the following is a copy." The Union National is charged with notice of this resolution, as it was the only authority, such as it was, the officers of the American had for signing the agreement.

2. The Agreement itself comes next and was executed and delivered that night.

In the first paragraph it provides, "The party of the first part hereby agrees to sell and assign *and does hereby sell and assign,* to the second party, its *cash on hand, office furniture* and *fixtures,* and such of *its bills receivable,* as the party of the second part on examination may be willing to take as cash without recourse on the party of the first part." Here is unquestionably an absolute sale of five different kinds of property, except that the number and amount of the bills receivable still remain at the option of the Union.

In the second paragraph it provides, that the Union National Bank shall "*liquidate* the remaining assets of the party of the first part, which may not be taken and received as cash by the party of the second part, without charge or expense to the party of the first part, except such court charges and attorney's fees as may be found necessary, and that *such liquidation* shall be conducted *under the direction* of Thomas L. Kimball." This is also clear. The Union is to do the liquidating, but it is to employ Kimball to act for it and is to pay him for his services. Just as A might say to B, "I will form a parnership with you to engage in manufacturing and selling goods, provided you will employ my son." The business is the business of the partnership and is under the control of the partnership and the son is employed by the partnership, but he is designated by A. The expenses of this liquidation were to be borne by the Union, except such court charges and attorney's fees as might be found necessary to such liquidation.

In the third paragraph it provides, that the American "hereby agrees to *sustain and pay* one-half the loss and expense which the party of the second part may sustain on account of removal from its present quarters by reason of its unpaid lease on its present place of business, and one-half of the loss which the party of the second part may sustain on the sale of its office furniture and fixtures, which furniture and fixtures

are agreed upon at the present price and value of three thousand seven hundred and fifty ($3,750.00) dollars,"—that also being the price and value fixed upon the furniture and fixtures of the American. This imposes upon the American the obligation to pay at an *indefinite* time in the future an *uncertain* amount. It is the creation of a *new* liability, and it cannot be said to be in any sense of the word a mere substitution of debts.

In the third paragraph it also provides, "The party of the first part further agrees to guarantee, *and does hereby guarantee* the party of the second part against any and all loss on account of assuming the liabilities of the party of the first part as aforesaid. And to *this end* the party of the first part agrees to execute and deliver to the party of the second part the three promissiry notes * * * * which notes shall drawn interest from date at the rate of six per cent. per annum, payable quarterly annually, and be payable in one, two and three years from date, respectively, and shall be non-negotiable. And in case of non-payment of any of said notes when due, the whole of said principal sums of all of said notes and accrued interest shall thereupon become due." That is, the notes are to be made for the purpose of making the amount thus guaranteed and the future times at which it shall be payable definite, and of determining the rate of interest such amounts shall bear. The guaranty is in effect that the assets shall turn out on liquidation to be sufficient to meet the amount of liabilities assumed by the Union. The time allowed for the liquidation is indefinite —dependent upon the success attending it and the wishes of the Union.

In the third paragraph it also provides, "And as further security to the party of the second part, the party of the first part agrees to sell and assign and *does hereby sell and assign* to the party of the second part all of its assets which remain * * * * subject to the right of said Thomas Kimball, or his suc-

cessor, to collect and convert the same into cash for the use and purposes hereinbefore expressed." This transferred the legal title to all other personal property not hereinbefore sold and the equitable title, at least, to all real estate, to the Union. Not a vestige of property wes left in the American. Neither it nor its Board of Directors could exercise any direction, or even supervision, over any of the assets which had formerly belonged to it. Nor is there any evidence that the Board of Directors ever attempted to do so.

3. The Agreement was immediatey carried into effect. It was executed and delivered on Saturday, and on the evening of that day the Union moved over and took possession of the office and furniture, etc., of the American. After working Sunday, the Union was ready at the opening hour on Monday to go on with its own business and the business of the American, and the assets of the American were in the possession and control of the Union and of Kimball, trustee.

4. The *amount* of the notes was determined and the notes signed later, on Monday, December 23, and a cashier's check given for $39,929.51—thus leaving no inducement for the Union to take any "bills receivable" not immediately convertible into cash.

WHAT WERE THE RESULTS OF THAT TRANSACTION?

1. The American sold its means (office, furniture, goodwill) of doing business and its cash and cash items absolutely, and transferred the title (legal and equitable) in *all* its remaining assets to the Union. It *ipso facto* ceased to do business as a bank, the only purpose for which it was organized.

2. It and its Board of Directors surrendered all control over its assets and the liquidation thereof, thus inrusting to others the exercise of all powers and discretion as to selling, collecting, compromising and applying the proceeds.

3. It guaranteed that such assets, so placed beyond its control and the control of its directors, should continue to be sufficient at some future time to meet the new obligations assumed—that is, that a sufficient number of its debtors were and should remain solvent and that its other assets should not shrink in value unduly.

4. It agreed to pay at an indefinite future time an indefinite sum to make good the losses (i. e., from the sale of the furniture and from the lease on the old quarters of the Union) which were inevitable, but which, and the causes of which, *had not existed prior* to December 21, 1895. The amount paid out of the assets of the American on account of this item of the lease alone, was $3,538.82. (See page 3 of Exhibit 33, page 289. The items and dates of payment from January 2, 1896, to December 27, 1897, appear on pages 12, 13 and 14 of Exhibit 33, found on pages 296-300 of the record. See, also, Burness, p. 246.)

5. Its officers executed and delivered its three non-bankable notes, they being non-negotiable in form and maturing at long periods—one, two and three years.

6. Its officers executed and delivered such notes after it had ceased to do any banking business and after it had sold and the Union had taken possession of, all its assets.

7. It agreed to pay interest at six per cent. per annum on $201,000.00 from and after December 23, 1895—$1,000.00 per month, $33.33 per day.

8. It imposed upon its shareholders, in addition to the liability for losses in paragraph 4 above and of interest in paragraph 7 above, a liability on and after December 23, 1895, of $201,000.00, *while they still remained liable* for every deposit in or claim against the American which was not actually paid by the Union or for which such depositor or claimant did not accept the Union as its debtor in lieu of the American. *Even if*

the words in the Agreement "to assume the liabilities of the party of the first part to its depositors and on account of its bills payable," obligated the Union to pay *all* the "debts, contracts and engagements" of the American for which its shareholders were liable, complainant has not proven or attempted to prove that the Union has paid them all; and even the Circuit Court has never made an order requiring other creditors of the American to present their claims and fixing a time within which they should do so.

9. The actual net result, financially, as shown by the decree, is this: The assets of the American have disappeared and there remains unpaid upon the notes $194,466.35. Or, to put it in another way, there has been credited upon the principal of the notes only $6,533.65, although complainant and the Union have received *as payments* upon the notes $66,330.40 (see page 5 of Exhibit 33, page 290; and Burness, p. 228), and $14,637.86 (see order, p. 125) making a total of $80,968.26. That is, $74,434.61 ($80,968.26 less $6,533.65), has been absorbed by way of interest on the three notes, and this is directly due to the *prolongation* of the liability of the American by reason of this transaction. Nor does this include the $10,258.50 expended on account of other items of interest (see pp. 291 and 292); nor the $5,827.15 expended on account of taxes from 1895 to 1900—the greater portion of which items were directly traceable to such *prolongation*. (See pp. 292 to 296.)

Such was the transaction and such were its results, briefly stated; and both are so fundamentally different from those upon which the authorities relied upon are based, that one cannot avoid a feeling of surprise that the Circuit Court did not apply the quotation from *King vs. The First National Bank* (Record p. 128) to them, instead of the *Schrader and Ward* cases. But we shall examine later those two cases and *Richmond vs. Irons*, which preceded them.

As the shareholders in a national bank are only *secondarily* liable and as the assets of the bank must be duly exhausted before their liability arises (*National Bank vs. Kennedy*, 84 U. S. 19, 21 (1873); 21 Law. Ed. 554, and *U. S. vs. Knox*, 102 U. S. 422, 425, (1880); 26 Law. Ed. 216), it follows that such shareholders can never be held liable unless the bank itself is also liable; although, as we shall see later, the shareholders may not be liable when the bank itself may be. This leads us, first, to inquire whether its Board of Directors *acting alone* had authority to bind the bank in and by such transaction; and second, whether the American itself had power to enter lawfully into such transaction.

WAS THE TRANSACTION *INTRA VIRES* ITS BOARD OF DIRECTORS?

The general rule is, that directors have no power, unless it is expressly conferred upon them, to make or consent to any fundamental change in the organization, charter or powers of a corporation, or to do other acts not within its ordinary business. *Chicago City Ry. Co. vs. Allerton*, 85 U. S. 233 (1874), 21 Law. Ed. 902. They have, *prima facie*, no authority to dispose of all the property of the corporation, discontinue its business and wind up its affairs

If, as held in *Roberts vs. Hill*, 24 Fed. 571 (1885), a national bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will *presently* be unable to meet its obligations, and will be obliged to suspend its ordinary operations, then it was the duty of the directors of the American to have called the attention of the Comptroller to that fact in order that he might investigate the condition of the bank. If he had found it necessary, he would have ordered the shareholders to make good the capital stock under Sec. 5205 and, if they had failed to do so, he would have

appointed a receiver. This course would have been in harmony with the provisions of the national banking Act and would have enabled the shareholders to elect either to continue the business of the bank or to go into voluntary liquidation or to submit to liquidation under the supervision of the Comptroller.

If, on the other hand, as held in *Case vs. Citizens Bank*, 2 Woods 23 (1873), Fed. Cas. No. 2489, a bank is insolvent only when it is unable to meet the demands *actually* made upon it in the ordinary course of its banking business, then the directors of the American did not have the slightest excuse for disposing of all its assets and closing its doors. Such a condition would not authorize the directors of any corporation to take such action, unless they were given special and unusual powers by the laws creating the corporation or by the charter accepted by the shareholders. Nor should we forget, that in the case at bar the right of the directors to dispose of all the property of the bank did not depend upon extrinsic facts resting peculiarly within the knowledge of such officers, but was incidently prohibited by the national banking act. Nor even if it had depended upon intrinsic facts, should we forget that the exact condition of the American was fully known to the Union from its examination of the books of account of the American and of the verious assets of the American, before the amount for which the notes were to be given under the terms of the contract could be determined.

But, in this connection, I may be permitted to repeat that when the Board of Directors of the American passed the resolution of December 21, 1895, the American was not in any immediate peril and did not owe the Union a single cent. There was only an alleged possibility that it might at some future time be called upon to pay three of its depositors—both time and amount being left indefinite by complainant's evidence. To say that directors can conclude in their own minds that there

may be a possible danger ahead of a corporation, and without using the ordinary means available to meet such danger (for instance, re-discounting some of its paper), can divest themselves of their trust and its obligations, and immediately dispose of all of its assets and close its doors forever, is to run counter to the authorities and to ignore one of the just rules protecting the rights of the stockholders. Again, every argument which follows and tends to convince one's mind that even the American itself did not have power to enter lawfully into this transaction, is doubly strong against such an implied power existing in the Board of Directors alone.

WAS THE TRANSACTION *INTRA VIRES* THE AMERICAN?

A corporation in general has such powers, and such powers only, as are expressly or impliedly conferred upon it, and any act which is not within the powers so conferred is impliedly prohibited. If certain powers are conferred by the law under which it is organized, then the law is construed as excluding or witholding all other powers than those enumerated, and such incidental powers as are reasonably necessary to the proper exercise thereof. The existence or non-existence of a power cannot be determined by what might or what might not benefit the corporation or its stockholders in a particular case, nor by the consent or non-consent of the corporation or its stockholders. (See, for instance, *Germania, etc., Co. vs. Boynton,* 71 Fed. 797, 801 (1896), 37 U. S. App. 602.) The whole matter has been clearly put by Justice Gray in a leading case, *Central Trans Co. vs. Pullman's P. C. Co.,* 139 U. S. 24, (1890), 35 Law. Ed. 55. And this is re-affirmed in later cases; but more of this hereafter.

This general principle has been applied to national banks and, as held in *Cal. Nat. Bank vs. Kennedy,* 167 U. S. 362, 366 (1897), 42 Law. Ed. 198, 200, "It is settled that the United States statutes relative to national banks constitute the *meas-*

ure of authority of such corporations, and that they cannot *rightfully* exercise *any* powers except those expressly granted or which are incidental to *carrying on the business* for which they are established."

Now, applying this principle to the case at bar, we contend:

First. That there is no power to enter into such transaction expressly given to national banks. It must, therefore, if granted at all, be an "incidental power."

Second. That the "incidental powers" of national banks are defined and limited expressly and affirmatively in Section 5146, Rev. Stats. They are only "such * * * * as shall be *necessary to carry on the business of banking.*" They are not such as may seem best to adopt to stop the business of banking or to liquidate the affairs of the bank after it has been stopped. Those matters are regulated in other sections of the banking act and will be considered next below. But this section applies *only* to the powers to be exercised while the bank is in active operation and, even then, strictly limits such incidental powers by stating that such active operation shall be carried on "by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; *by* receiving deposits; *by* buying and selling exchange, coin and bullion; *by* loaning money on personal security; and *by* obtaining, issuing and circulating notes according to the provisions of this title."

If, then, we apply the general rule that the enumeration of powers implies the exclusion of all others, we find no incidental power in the American to engage in such a transaction. Nor is it an answer to say, that *third* parties equally guilty with a national bank cannot in some instances plead that the act in which they joined and of which they received the benefit (such, for instance, as the loaning of money on a real estate mortgage) is not binding upon *them*. For all such cases start

with the proposition that such acts *are* beyond the incidental powers of a national bank and *are* grounds of forfeiture by the government of the privilege of doing a banking business; and no act of which may be a ground of forfeiture can be said to be done lawfully under an incidental power. This is illustrated by *Cal. Nat. Bank vs. Kennedy*, 167 U. S. 362 (1897), which holds that a national bank cannot under section 5136 purchase stock in another national bank, even though it may have power to become the owner thereof by taking it as collateral and buying it in at a sale to enforce the payment of the amount loaned upon it.

Third. That the power to enter into such a transaction is also impliedly denied by the *general trend* of the laws governing national banks and the *object* those laws have in view. Under those laws there can be only two kinds of liquidation—one voluntary, the other involuntary. Let us, then, examine the provisions with reference to them particularly.

Involuntary liquidation—Failure to restore the capital stock to the minimum required by law (5141), failure to maintain its surplus (5151), failure to make good its reserve (5191), failure to dispose of any of its own stock rightfully acquired by it (5201), failure to make good its capital stock when impaired by losses (5205), false certification of checks drawn upon it (5208), refusal to pay its circulating notes (5234), forfeiture of its franchises by a court (Sec. 1, Act of June 30, 1876,) or failure for 30 days to pay a judgment against it (*id.*),—each is a cause for the appointment of a receiver of the bank by the comptroller. Not only this, but he should do so whenever he is "satisfied of the insolvency" of such bank (*id.*).

These provisions are so minute and yet so broad, that it would be difficult to imagine a condition not met by them. And yet the remedy is always the same, to-wit: a liquidation of its

affairs by a *public* officer who is under bond and oath, who represents both creditors and stockholders, and who is far removed from the influence always exercised by large shareholders in ordinary liquidations.

Voluntary Liquidation—Sections 5136 (Second) and 5220 provide that a bank may be voluntarily dissolved and liquidation upon a two-thirds vote of its shareholders. Section 8 of the act of June 20, 1874, makes it the duty of the treasurer and national bank depositaries to assort and return to the treasury for redemption the notes of such national banks as have failed or gone into voluntary liquidation, and section 5223 provides that the treasurer cause such notes "to be mutilated and charged to the redemption account of the association." The purpose is to withdraw *speedily* from circulation the notes of such banks as are no longer engaged in active business. Such a transaction as the one in question is diametrically opposed to these provisions. By that Agreement the American sold to the Union, with its other assets, its equity in the bonds deposited with the treasurer to protect its circulation and, if it had not gone through the form of "voluntary liquidation," those bonds might have remained there to this day and the notes secured thereby be still in circulation. Surely Congress did not intend that it should be within the power of national banks to bring about such a result.

Section 5221 provides the *method* of procedure—how notice shall be published in order that claims may be duly presented to the bank. It manifestly implies that the Board of Directors of the bank shall have an opportunity to admit or reject any claim so filed. Certainly, it does not imply that the directors of another bank or any private individual shall have the exclusive right and power to admit or reject claims made against a bank which is in process of liquidation. Indeed, the very existence of the bank continues so that *it* may sue and be

sued. *Central Nat. Bank vs. M. L. I. Co.*, 104 U. S. 54, 73 (1881), and *Chemical Nat. Bank vs. Hartford Deposit Co.*, 161 U. S. 1, 8 (1896). And yet the Agreement between the American and Union gave to the Union and to Kimball the sole and final determination what claims against the American should be paid voluntarily. There was nothing to prevent the payment of claims which the directors might have desired to contest; and *vice versa*. The rights and duties of directors, which are set out in section 5145 and mentioned below, could not be abrogated in this way.

Fourth. That the power to enter into such a transaction is impliedly prohibited by certain other sections of the laws governing national banks.

Section 5145 provides that "The *affairs* of each association *shall* be managed by *not less* than *five directors*," and that *each* of them must be personally interested in the bank as a shareholder. Section 5147 provides that each of the directors "*shall* take the oath that *he* will * * * * diligently and honestly *administer* the *affairs* of such corporation." And in *Richmond vs. Irons, post*, the Supreme Court clearly intimates that the duties and responsibilities of the directors do not end when a bank closes its doors, but extend through the whole process of liquidation. And the important place in the national banking system held by these sections is shown in *First Nat'l Bank vs. Hawkins*, 174 U. S. 364, 368 (1899). But under the Agreement, the duties and responsibilities of the directors absolutely ceased.

Section 5133 (second paragraph) determines the limit of time for which a bank may exist, unless sooner dissolved "by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law." And this is inconsistent with the idea that its directors can dissolve it *de facto*, as was done in the case at bar.

Section 5137 provides that a national banking association "may purchase, hold and convey real estate" for the purposes therein mentioned, but does not authorize the mortgaging of real estate or the conveyance thereof as security for money borrowed by it. And this provision is exclusive; and its violation is a ground of forfeiture by the government.

Section 5202 provides, "No association shall at any time be indebted, or *in any way liable,* to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, *except* on account of demands of the nature following," and the three notes for $201,000.00 are not of such a nature, while the capital of the American was only $200,000.00; and this $201,000.00 does not include the cashier's check for $39,929.51, nor the liability assumed in the Agreement by the American for loss upon the furniture and lease of the Union. It will not do to say, that because the notes represented partially money used in paying off "moneys deposited with or collected by the association," it thereby lost its own nature and acquired their nature. (*Richmond vs. Irons,* and *Ward vs. Joslin, post.*) Nor can it be said that the Union had no means of knowledge as to the *status* of the American, nor that a mistake as to the law excuses it.

Section 5222 provides that such association, within six months from the vote to go into liquidation, "*shall* deposit with the Treasurer of the United States lawful *money* of the United States sufficient to redeem *all* its outstanding circulation." And yet in the transaction in question the American actually sold and delivered all its cash and cash items to the Union and put it out of its power to comply with this section. If this section was compiled with formally, it was done by some arrangement made outside of that Agreement, and in that arrangement the American and its directors had no voice whatever. It may have been done nominally in its name or by its officers, but it

must, in fact, have been done with money advanced by the Union, or with the proceeds of the sale or collection of the assets held by it for liquidation.

Section 5230 provides that the United States "shall have a *paramount lien* upon *all* its assets" to secure any deficiency in the proceeds realized from the bonds deposited by the American to secure its circulating notes. And yet, by this transaction, the American sold and delivered *all* its assets to the Union, and its cash and items taken as cash were mingled with the funds of the union. If the Union had failed, the United States could not have separated these from the general assets of the Union. Such a transaction might have made it difficult or impossible for the government to enforce its lien. *First Nat. Bank vs. Colby*, 88 U. S. 609 (1875), 22 Law Ed. 687.

Section 5153 makes the national banks depositories of public money, and section 5497 provides the penalty for the unauthorized receipt or use of public funds, and is so broad in its terms, that if the American had public money on deposit and the Union received it in this transaction, the officers of the Union would be liable for the penalty provided. It will not do to say the American had no such funds. We do not know whether it had or not; but the fact that the exercise of such a power in any case might lead to a violation of the criminal laws is *prima facie* evidence that Congress did not intend to grant it.

Section 5146, on the one hand, requires that at least three-fourths of the directors of a national bank shall reside in the state in which the bank is located; and, on the other hand, ~~requires~~ each director to own only ten shares of stock. This *compels* non-resident shareholders to rely exclusively upon the honesty and capability of resident directors. If, then, the transaction in question is held to be *intra vires*, it follows that a majority of the directors of any national bank, being residents

and owning only a very small fraction of its stock, can without the knowledge of shareholders in other states, who may own a large majority of the stock, close the bank, sell its good-will to another bank in that locality (in which they are, or in which they may become directors), put its assets out of their immediate control, trust the liquidation of the affairs of the bank to others with power to prolong such liquidation indefinitely, guarantee that its assets, so managed, will ultimately produce certain results, and thereby make such non-resident shareholders liable for any deficiency which ultimately may arise from the transaction. In the case at bar, the directors who approved the deal held altogether only 180 out of 2,000 shares of the Capital Stock of the American.

Fifth. That the power to enter into such a transaction is expressly prohibited by section 5242 of the U. S. Revised Statutes.

For said section expressly says that any transfer or assignment made by a bank in contemplation of insolvency "with a view to prevent the application of its assets in the manner prescribed by this chapter or with the view to the preference of one creditor to another * * * *shall be null and void.*" The only excuse for the transaction given by complainant's witnesses was, that the American would *soon* be unable to pay the deposits held by the state, county and city treasurers. The Agreement was, then, made to all intents and purposes in contemplation of insolvency. Again, the manner of the application of the American's assets provided in the Agreement was neither by its directors in voluntary liquidation nor by the Comptroller in involuntary liquidation—the only two processes recognized in the chapter. Again, if the Agreement had been carried out by the Union and Kimball according to its express terms, it would have had no other result than the preference of one creditor over another. The United States banking laws

do not recognize any greater right to payment in the case of a depositor or of one holding a "bill payable," than in the case of any other creditor of a bank; but the Agreement provided that the Union should only "assume the liabilities of the party of the first part (the American) to its depositors and on account of its bills payable;" and to secure the Union for *that* liability, *all* the assets of the American were by the Agreement transferred and assigned to the Union to be liquidated under the direction of Kimball. But there were then existing other claims against the American and other creditors. The American was indebted for salaries due its employes to Dec. 21st, for taxes due the city of Omaha, for sums due attorneys for services theretofore performed, for rent, and for other outstanding obligations. For instance, there were "liabilities prior to liquidation" to the amount of $22,799.90 (Record, p. 281 and which are itemized on page 289), and "expenses prior to liquidation" to the amount of $4,985.99 (Record, p. 281, and which are also itemized on p. 289). The first item included, among other things, interest on public funds, to-wit: county funds $293.24; city funds $7.94; state funds $1.83; and interest on bank balances $4.55 and $147.20 due William Minot and $20.61 due Lawrence Minot (Record, pp. 289 and 291). It also included "overdrafts with correspondents" $2,245.76 (Record, p. 289).

The second item included, among other things, "duty on circulation" $225.79 (Record, pp. 289 and 296), and salaries from Dec. 15, 1895, $268.86 (Record, pp. 289 and 296), attorneys' fees (Record, pp. 289 and 291), court costs, personal taxes (also p. 292) and rent to Dec. 23, 1895 (also p. 226).

"Bills payable" do not embrace any of these items. Record, pp. 186, 238, 274. Bouvier (Rawle's Edn. 1897). None of these creditors were "depositors." The *terms* of the Agreement, therefore, did not provide for them and *the Union was*

not obligated to pay them. But *all* the assets of the American had been assigned to and transferred to the Union—thus leaving nothing to meet the other obligations of the American. As the Union had not assumed them, *it did not, in fact, pay them or advance the money to pay them.* It is true, these obligations were paid out of the assets of the American so assigned and transferred. Whether this was done with the consent of the Union does not appear and is immaterial. The point is that the Agreement under which these three non-negotiable notes were given was on its face "null and void" *at the time* it was approved by the directors of the American and was executed and delivered by the two banks. It could not be validated by subsequent acts of the Union or Kimball, in which acts the American did not join. Indeed, it could not be validated by anything which the banks and Kimball might do, even had all three acted in concert.

National banks are not mere private money-making corporations. If that was the sole object of their existence, Congress would never have had any legitimate reason for passing laws for their organization and management; and state banks, which had power to issue notes for circulation, would have been permitted to continue to exercise that power. (Sec. 19 of Act of February 18, 1875). But national banks are instrumentalities of the government and were created to provide a national currency and for its circulation and redemption and to serve as safe depositaries of public money. (See title to banking ace and Sec. 5153, Rev. Stats.) "The key to the proper interpretation of an act of Congress is its policy and purpose." (*Mercantile Nat. Bank vs. New York*, 121 U. S. 138—1887). To say that such an instrument of government can cease its functions in any way other than that provided by law, is to say that the shareholders of a bank having assumed certain re-

lations to the government--relations which are beneficial to the government—may change those relations at any time and in any way they deem fit. *Prima facie* and as a matter of broad public policy, this cannot be done by them even when they act collectively and unanimously, and in a regular or properly called special meeting. Certainly a portion of them acting directly or indirectly cannot do it. Much less can the officers—mere agents of the shareholders—do it. But in addition to all this, the Act is complete in itself, provides expressly when and by whom a bank shall be liquidated and is exclusive of all other methods.

In *Nat'l Bank vs. United States,* 107 U. S. 445 (1883), 27 Law Ed 537, the court, in holding that Sec. 3466, Rev. Stats., which gives priority to the general demands of the United States against insolvents, did not apply to national banks, said:

> "*Everything* essential to the formation of the banks, the issue, security and redemption of their notes, the *winding up* of the institutions and *the distribution of their effects,* are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates."

And in an able opinion, Judge Blodgett (*In re Manufacturers' Nat. Bank.* 5 Biss. 499 (1873), Fed. Cas. No. 9051), held that when the legislature creates a corporation, it can also prescribe what remedies shall be had against it and that such remedies then become exclusive; and that the Bankruptcy Act, although broad enough in its terms, did not make national banks liable to be proceeded against in bankruptcy.

In *First Nat. Bank vs. Colby,* 88 U. S. 609 (1875), 22 Law. Ed. 687, the Supreme Court said:

> "The act of Congress prescribes the condition upon which national banks shall be created; the powers they

shall possess; and the consequences of their failure to meet their obligations. All persons dealing with these institutions can only acquire and enforce rights against them under the limitations there designated."

In New Jersey a failing corporation cannot sell out all its assets to another corporation, in as much as the statutes authorize a dissolution by a failing corporation, and the sale can be made in connection with such dissolution. (*Hunt vs. American, etc., Co.*, 81 Fed. Rep. 532 (1897).

In *Bank Comr's vs. The Bank of Brest*, 1 Harr. Ch. (Mich.) 106, 111, 112, the court said:

"The assignment set up in the answer is an assignment by the directors of *all the* estate, real and personal, and assets and effects of the bank, to a trustee. A transfer by way of security of a *portion* of its effects for the purpose of *carrying on* the concern is within the power of the directors; and a corporation which has *no particular mode* pointed out for closing its concerns may make an assignment on obtaining the assent of the stockholders. * * *

The directors, in making the assignment in question, without authority from the stockholders, have exceeded their powers.

They are made trustees of the stockholders, for the purpose of carrying on the business of the corporation, and not for the purpose of winding it up and destroying its existence. *Angel and Ames on Corp.*, 507; 3 Des., 557.

The statute prescribes the manner in which the affairs of this class of corporations shall be wound up in case of insolvency. This forms a part of the security to the public, and is one of the conditions upon which they take their chartered powers. An assignment made manifestly with a view to evade the provisions of the statute, as this seems to have been, is against the policy of the law, and cannot be sustained."

The Supreme Court has held in *Graham vs. Railroad Co.*, 102 U. S. 148, (1880), 26 Law. Ed. 106, that corporations, unless restricted by their charters or by general statutes, may make assignments for the benefit of creditors to the same extent

that individuals may. But no one would contend for an instant that a national bank could lawfully make an assignment for the benefit of creditors. And yet the strongest plea, (to-wit: that this transaction was adopted to pay the debts of the American), urged upon the court below, was that this transaction had the effect of such an assignment.

As we have said before, the state has power to determine in the laws under which corporations are to be organized, how their *liquidation* shall be conducted. The parties interested are, the state, creditors, shareholders and the corporate body. When debts have been incurred, each of these four interested parties has a vested right in the method of liquidation provided by those laws. As shareholders, for instance, have a right to insist that the method provided by law shall be followed, it follows that every shareholder in a national bank, no matter how small his interest may be, has an absolute *right* to rely upon the provisions in the national banking laws and upon each of them; and no shareholder or combination of shareholders, and no officer or officers of his bank, has or have the power to deprive him of that right.

If, then, I am right, it follows that the transaction was not only beyond the powers conferred upon the American and in excess of the authority of its Board of Directors, but was prohibited by the national banking act and was against public policy. Hence, it was not only *ultra vires* in the sense that it was an act which was not and could not be authorized by the bank or its directors or its shareholders, but also in the sense that it was a n illegal act, i. e., contrary to public policy and in violation of the banking laws. The state courts are hopelessly at variance as to what are *ultra vires* acts, and as to what are the effects of such acts, and even the decisions of the Federal Courts are sometimes apparently conflicting—at least in the application of the rules established by the Supreme Court. But

we can readily distinguish the case at bar from many of the cases. It is not a case where a corporation has disposed of a part of its property in the usual course of business, nor a case where it has disposed of all property in *payment* and *satisfaction* of all its indebtedness, thus having a clear sheet. It does not involve simply an irregular or defective execution of powers possessed; nor does it involve the exercise of powers not possessed, but the exercise of which cannot result in anything unusual or illegal or contrary to public policy or injurious to the interests of any of the shareholders of the corporation. Nor is it a case where a contract has been fully executed on both sides and one of the parties is seeking to *deprive* the other of what has been acquired under it. Nor is it a case where the contract has been fully performed by one party and nothing done by the other party, except receive the benefits; for all the assets of the American were actually, even if unlawfully, transferred to the Union. Nor is it a case where a contract is apparently within the powers of a corporation, one party thereto, and the other party is ignorant of extrinsic facts rendering it *ultra vires*. Nor is it a case where a corporation, authorized to do so under some circumstances, executes and delivers a negotiable note for an unauthorized purpose and is sued by a *bona fide* purchaser thereof for value. Nor was it strictly a case where a contract has been fully performed by either party thereto; for, on the one hand, the Union had not fully liquidated the assets of the American, as it agreed to do, and, on the other hand, the American had not fully paid its notes. But, assuming *arguendo*, that the transaction in the case at bar is one where a contract has been executed on one side only (and this is most favorable to complainant), the Supreme Court holds that the fact, that a contract has been executed by one party and the other party has received the benefit thereof, does not give the contract validity, and further holds that no action

will lie *on the contract*. Whether the corporation is plaintiff or defendant makes no difference.

Pearce vs. Madison, etc., 62 U. S. 441 (1859), 16 Law. Ed. 184.

Central Trans. Co. vs. P. P. C. Co., 139 U. S. 24 (1891), 35 Law. Ed. 55.

Louisville, etc., vs Louisville, etc., 174 U. S. 552; 567 (1899), 43 Law. Ed. 1081.

O'Brien vs. Wheelock, 184 U. S. 450, 490, (1902), 46 Law. Ed. 636.

But the answer of complainant was that he might disaffirm the contract and sue the American upon an implied contract to recover the money paid out by the Union for the benefit of the American. Assuming, *arguendo*, this to be true, it is immaterial what might have been done. But there was a good reason why complainant did not disaffirm the contract and sue these *shareholders*. He would have been met with this conclusive answer, "We have had no dealings whatever with you and we cannot be held liable for any action of the bank or its officrs which you admit was *ultra vires*."

It is unnecessary to discuss further the question whether the American, having assigned and transferred to the Union *all* its assets, is estopped to deny its liability to a deficiency judgment. For the Supreme Court has twice in recent years held that a shareholder can go behind even a judgment rendered against his corporation for some transaction in which it has received a valuable consideration, and can show that the transaction was not of such a nature as to impose any liability upon him as such shareholder.

Whitman vs. Nat'l Bank, 176 U. S. 559 (1900), 44 Law. Ed. 587.

Ward vs. Joslin, 186 U. S. 142 (1902), 46 Law. Ed. 1093.

And in the latter case also held, "If, however, under the state decisions, the corporation would be held estopped from denying the liability, it does not follow that the *stockholders* must therefore be held liable, if the obligation was, in fact, *incurred without authority.*" (151.)

III.

THAT THE LIABILITY OF SHAREHOLDERS IN NATIONAL BANKS IS A RESTRICTED LIABILITY AND THE TRANSACTION BETWEEN THE BANKS WAS OF SUCH A NATURE THAT APPELLANTS ARE NOT LIABLE FOR ANY DEFICIT ARISING THEREFROM.

But even though we assume, *arguendo*, that the transaction was not *ultra vires* the American or its Board of Directors, still the shareholders of the American are not liable for a deficit arising therefrom. A stockholder of a corporation is not, speaking generally, liable beyond the amount of his unpaid subscription, for its debts. (*U. S. vs. Stanford*, 161 U. S. 412, 429 (1895), 40 Law. Ed. 751.) We must then turn to Sec. 5151, Rev. Stats.—the only provision on the subject in the national banking law—to learn the liability of appellants as shareholders in the American. And, in this connection, we contend that the transaction was, to say the least, an unusual and even extraordinary one, while appellants under that section are liable as shareholders, *only* for the contracts, debts and engagements of the American *duly* contracted by it *in the ordinary course of the business of banking.* First, then, let us examine the cases upon that subject in the Supreme Court.

Richmond vs. Irons, 121 U. S. 27 (1887), 30 Law. Ed. 864.

The opinion was delivered by Mr. Justice Matthews.

Depositors in the Manufacturers' Nat. Bank having balances due them *at the time* it went into voluntary liquidation, accepted in payment thereof commercial paper held by the bank and endorsed and guaranteed in the name of the bank by its president. The court held that such depositors "are not to be considered as creditors of the bank entitled to subject the stockholders to individual liability." (p. 60.) Why? Because, "the individual liability of the stockholders as imposed by and expressed in the statute, is indeed for all the contracts, debts, and engagements of such association, but must be *restricted* in its meaning to such contracts, debts, and engagements as have been *duly contracted in the ordinary course of its business.*" This was formulated as a general rule (a general construction or definition of the meaning of the statute), and the persons against whom it was applied, had been *depositors*, in whose favor debts were incurred by the bank in the ordinary course of its business. Why, then, was it applied as against them? The court says, "It is not within the power of the officers of the bank, without express authority (from the shareholders), by such means to *prolong indefinitely an obligation on the part of the shareholders*, which is imposed by the statute *only as a means* of securing the payment of debts by an insolvent bank *when* it is no longer able to continue business, and for the purpose of effectually winding up its affairs. This is the very meaning of the word 'liquidation.' Mr. Justice Story said, in *Fleckner vs. Bank of U. S.*, 21 U. S., 8 Wheat. 362 (5:636): 'Its ordinary sense, as given by lexicographers, is to clear away, *to lessen debt*, and in common parlance, especially among merchants, to liquidate the balance is to pay it.' In *White vs. Knox*, 111 U. S. 787 (28:603), it was said: 'The business of the bank must stop when insolvency is declared.' In *National Bank vs. Insurance Co.*, 104 U. S. 54 (26:693), the

liquidation of such an association was said to be like that which follows the dissolution of a co-partnership." By the transaction in question in the case at bar, the debts of the American were not paid, nor even decreased. Its liabilities were, on the contrary, increased and prolonged.

Schrader vs. Manufacturers' Nat. Bank, 133 U. S. 67 (1890), 33 Law. Ed. 564.

The opinion was delivered by Mr. Justice Blatchford. This case grew out of *Richmond vs. Irons* and was based upon an agreement made after the bank went into liquidation *to continue* its guaranty of certain notes made *before* it went into liquidation. In other words, the nature of the liability remained the same. It was simply prolonged. The court quotes from *Richmond vs. Irons* at length, approves the rule there laid down, and concludes that the shareholders were not liable "in view of what was said by this court in the case of *Richmond vs. Irons*, before quoted."

Ward vs. Joslin, 186 U. S. 142 (1902), 46 Law. Ed. 1093.

In this case there was an attempt to hold a shareholder of the Western Investment Loan & Trust Co. of Kansas liable for a guaranty of the payment of certain notes, which guaranty was given *for a valuable consideration*, and while the company *was a going concern*. The opinion was by Mr. Chief Justice Fuller. In discussing the question whether the word "dues" in the Constitution and "debts" in the Compiled Laws of Kansas, covered this guaranty, and whether the shareholder could go behind the judgment rendered against the company upon such guaranty, the court said (p. 152):

"In *Schrader vs. Manufacturers' Nat. Bank*, 133 U. S. 67, 33 L. Ed. 564, 10 Sup. Ct. Rep. 238, *it was ruled* that,

although the individual liability of the stockholders of a national bank, as imposed by and expressed in the statute, was for all its contracts, debts and engagements, 'that must be restricted in its meaning to such contracts, debts, and engagements as have been duly contracted in the ordinary course of its business,' and that a judgment recovered against the bank in a suit commenced some years after it went into liquidation was not binding on the stockholders in the sense that it could not be re-examined."

This quotation was in point because it aided in defining the word "debts," and because the guaranty (while made by a going concern) was not made "in the ordinary course of its business," and because a shareholder of the company was seeking to go behind a judgment rendered against that company. If the quotation was not considered an authoritive definition by the Supreme Court of what Congress meant by Rev. Stats., Sec. 5151, why appeal to it? Three judges of the Supreme Court have, in the last eighteen years, (1887—1890—1902) used these same words to express what was meant by the words "contracts, debts and engagements" in section 5151. In the first two cases, it was necessary to decide that question, and in the third case the answer was recognized and adopted as an authoritative definition.

It is recognized as such in *Thompson on Corporations*, Sec. 3104, and in text books.

From these cases it appears, (1) that the liability imposed upon shareholders by Sec. 5151, Rev. Stats., is a *means* of securing the payment of a bank's debts *at the time* when it is no longer *able to continue business;* (2) that the *purpose* of the section is to secure the effectual *winding up* of the bank's affairs; (3) that such liabality *cannot be prolonged.* And it further appears, that there can be *no liability* on the part of shareholders, unless the contracts, debts or engagements have been contracted (1) duly, and (2) in the ordinary course of the bank's business. And it further appears that the fact, that

the new obligation *takes the place* of an old obligation for which the shareholders may have been liable, does not make them liable for such new obligation.

The "business of banking" was thus defined in *Mercantile Nat. Bank*, 121 U. S. 138 (1887), 30 Law. Ed. 895, while the court was passing upon the right of the states to tax capital invested in national banks:

> "The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand: in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans; and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital.'"

Nor is there anything peculiar in the rule that shareholders of national banks are liable only for contracts, debts and engagements duly contracted in the ordinary course of their business. It is simply the rule generally applied to other corporations. As said in *Central Trans. Co. vs. P. P. C. Co.*, 139 U. S. 24, 64 (1890), and often repeated, "the interest of the stockholders, not to be subjected to risks which they have never undertaken" is one of the reasons why contracts made by a corporation beyond the scope of its powers are unlawful and void. And as said in *Ward vs. Joslin*, 186 U. S. 142, 151, (1902), "Rights of stockholders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was within their contract in legal contemplation."

Therefore, even if the American could be rightfully held liable for the *balance* remaining unpaid on the notes after its assets in the hands of the Union had been sold and applied

thereon, still the liability of its shareholders was so restricted by section 5151 as interpreted by the Supreme Court, that appellants were not liable individually for such balance. Because it was not, and coud not in the nature of things be, "the business of banking" (much less its ordinary course), for the officers of a bank to sell its good-will and means and place of business to another bank, no matter what the consideration may have been. Again, can it be said that it was in the "ordinary course" of the business of banking or in the "legal contemplation" of the shareholders of the American at the time they purchased the shares held by them, that the officers of the bank would assume the payment of the unearned and unpaid rental of an office formerly occupied by another bank; exchange furniture with another bank, assuming half the loss which might follow such exchange; "borrow" a sum larger than the capital stock of their own bank; issue non-negotiable notes therefor and agree to pay interest thereon for one, two and three years; turn over to such other bank for liquidation all the assets of their own bank; abdicate the offices to which they were elected; refuse to exercise the duties imposed upon them by law; and do all this without calling a meeting of the shareholders, but so secretly and quickly that no shareholder could have an opportunity to protest? It would be difficult, we submit, to conceive of an action which would be farther removed from the ordinary course of the business of banking, or which would be less probable to be in the contemplation of the shareholders of a bank, or would be a more complete abdication by officers and directors of their powers, or would be a more complete refusal to exercise the duties imposed upon and assumed by them as directors, or would more completely deprive the stockholders of all control over the property belonging to them, or would make it more impossible for them to restore things *in statu quo*.

Again, if this transaction is even of doubtful propriety under any section of the banking laws, can it be said to have been within the "legal contemplation" of the shareholders of the American or within the ordinary course of the business of banking as carried on in this country? If not, then we submit that these appellants are not liable and, more than that, that the Union, also a national bank, could not at the time it entered into the transaction, have thought them liable nor have placed any reliance upon their liability. But of this we shall speak again.

IV.

THAT APPELLANTS HAVE NOT DONE ANYTHING TO ESTOP THEM TO DENY THEIR LIABILITY TO MAKE GOOD THE BALANCE REMAINING UNPAID UPON THE NOTES.

The Circuit Court did not hold appellants liable upon the ground of express or implied ratification by them of the action of the officers and board of directors of the American, but the Court of Appeals said (Record, p. 399), "Every consideration of equity, good conscience and justice leads to the conclusion that the shareholders should be held to have ratified and approved of what was done and what was then being done." So that we must consider in some detail the evidence upon which the opinion (Record, p. 398) of that court was based. Ratification is sometimes implied from silence or from the acceptance of benefits, and in the last analysis is founded upon the doctrine of estoppel. But there is no such thing as a blanket estoppel covering the innocent and the guilty, equally and together. The Court of Appeals, however, did not draw any distinction between the shareholders of the American.

If we assume, *arguendo*, that a contract *ultra vires* a corporation *can* be rendered enforceable against its stockholders

by the principle of estoppel, then it becomes necessary to discover what each of these appellants did or failed to do in connection with the transaction. We have already summarized the bill, the amended bill and the answer, and have learned that the claim of estoppel, *first set out in the amended bill,* is based upon the alleged knowledge of the shareholders of the American of the proposed deal, and upon the alleged benefits received by them therefrom, and upon the alleged inducement to change its position offered by them to the Union. See Record, pp. 1-9 and pp. 24, 25 respectively.

The Court of Appeals did not, however, base it opinion upon the facts alleged in the amended bill as complainant's ground of estoppel. This appears in several ways. First, because that court made no distinction as to their liability between the various shareholders, although the complainant not only failed to prove (as he had alleged) that all of them had knowledge of the deal, but affirmatively proved that the great majority did not have such knowledge. Secondly, because the complainant's evidence failed to show any benefit received by any shareholder directly, or any benefit received indirectly, except a theoretical "incidental benefit" which turned out to be an actual disadvantage. Thirdly, because complainant affirmatively proved that none of the shareholders (unless, perhaps, we except Mr. Kimball and Mr. Baird) offered the Union any inducement to or persuaded it to enter into the Agreement. The Court of Appeals founds its opinion upon what occurred, or did not occur, *after* the Agreement was fully consummated.

Let us, then, first review what was actually done at the various meetings of the shareholders, so that the acts of each of these appellants may hereafter appear separately and distinctly.

But before examining the proceedings of the meetings it may be well to consider the claim made by complainant that

appellants Levy, Wyman and Smith occupied positions somewhat different than mere shareholders. It is true that Levy was a director of the American, but he had nothing to do with the negotiations leading up to the Agreement. It is also true that appellant Wyman was actively engaged in the transaction as cashier, but he was not a director nor had he any part in the negotiations; and what he did in signing the Agreement and notes was done as an employee of the bank and under the express directions of the Board of Directors. Appellees contend in their brief that as to appellant Smith, "the items of expense will show many fees paid to Mr. Smith for his services" for Kimball as trustee under the Agreement. This was a mistake. The Record, (p. 291,) does show payments to Smith, but the testimony of Mr. Burgess (Record, pp. 244, 245,) explains that the services were rendered to the American *prior* to Dec. 21, 1895, and were never paid in full.

To proceed with our review, the deal was made and closed on December 21-23, 1895, and the first meeting of the shareholders thereafter was the annual meeting of January 14, 1896. The notice of this meeting (pp. 254, 255) simply was to the effect that there would be brought before the meeting the question of amending the Articles of Incorporation. Apparently this is all that was intended to be brought before that meeting; but certain shareholders desired to know why the officers of the bank had made the deal with the Union. An explanation was given but *no action* whatever was taken by the shareholders present and *no effort made to have them approve the action of the officers* (Record, pp. 259-260). Appellants in their brief in the Court of Appeals says that the record recites the names of a large number of stockholders who expressed satisfaction at the action of the directors. There is no other evidence of this than the minutes of that meeting (which are incompetent), except the testimony of Mr. Baird, who confines himself to stating

what General Manderson said. But his approval, occurring after the event, does not indicate any intention of waiving any objection to the legality of the transaction or of extending his shareholders' liability beyond that provided in the U. S. Statutes. The shareholders present, however, were confronted by *the fact* that the bank had actually ceased doing business and passed this resolution (Record p. 261): "RESOLVED, that the directors of the American National Bank of Omaha, Nebraska, be and hereby are instructed to take action looking to the liquidation *required by law.*" There is here no recognition of the Agreement between the banks and no reference whatever to the liquidation of the assets which had been in the actual possession and control of the Union and Kimball for more than three weeks. Indeed, there could be no liquidation of *those* assets under sections 5220 and 5221 of the U. S. Revised Statutes even if they were in existence intact, except by getting them away from the Union; for as we have shown (p. 53, ante,) such liquidation is to be carried on under the direct supervision and direction of the directors of the bank. The vote of the shareholders present was in regard to "liquidation required by law," and evidently was intended to bring the corporation to an end lawfully, as its officers had brought it to an end in fact, but unlawfully.

At the next meeting of the shareholders, a special one, held on Feb. 25, 1896 (Record p. 264, Exhibit 14), the directors, under the authority conferred by the above resoultion, presented the following resolution, which was passed, to-wit: "RESOLVED, that the American National Bank of Omaha, Nebraska, be placed in voluntary liquidation under the provisions of sections 5220 and 5221, U. S. Revised Statutes, to take effect the 25th day of February, 1896, and that Thomas L. Kimball be and hereby is appointed agent and trustee of the shareholders of said bank to effect such liquidation." It is contended,

however, that these words in the latter resolution, "and that Thomas L. Kimball be and hereby is appointed agent and trustee of said bank to effect such liquidation" should be construed as an approval of the Agreement, although they were presented to the shareholders under the guise of carrying out the first resolution. We think this contention is erroneous, for several reasons. The first is, that the first resolution contained the words "liquidation required by law," and the second resolution contained the words "that the American.....be placed in voluntary liquidation under the provisions of sections 5220 and 5221, U. S. Revised Statutes.....and that Thomas L. Kimball be.....appointed.....to effect *such* liquidation." to-wit: the liquidation under such sections. But the laws of the United States recognize only two methods of liquidation, i. e., the voluntary liquidation under said sections, to be carried on under the direct supervision of the directors of the bank and the involuntary liquidation conducted by the Comptroller. The private liquidation by the Union and Kimball was, therefore, neither a liquidation "according to law" nor under said sections. The second reason is, that the "Certificate for Voluntary Liquidation" forwarded to the Comptroller (Record p. 267 and Exhibit 34, p. 307) expressly states that the liquadition is under said sections. Nor does the letter of the Comptroller (Record p. 269, Exhibit 18) dated April 27, 1896, nor does his "Certificate for Certified Copy" (Record p. 307, Exhibit 34) indicate his knowledge of or his purpose to approve any liquidation except one under said sections. Indeed, there is nothing in the record to show that the Comptroller knew the phrasing of the resolution appointing Kimball as agent. In the letter of the cashier of the American to the Comptroller dated April 23, 1896 (Record, p. 268, Exhibit 17) the writer, however, says: "Our directors have not yet received from you formal consent to the liquidation of this

bank in accordance with the decision reached by you in our interview of the fifteenth instant, and I have been instructed to ask of you such formal consent, in order that it may be incorporated in the bank's records." The evidence does not show what was said at that interview but we cannot *assume* that the Comptroller was informed of the Agreement between the two banks, because section 3 of the Act of June 30, 1876, is the only provision in the U. S. Banking Laws which authorizes the selection by the shareholders of a national bank of "an agent" to liquidate the affairs of such a bank; and by that section the appointment of an agent must be preceded by and based upon the condition that all the creditors of the bank had been paid in full. But according to the theory of appellees, the debts of the American had not been paid, i. e., instead of owing various debts to various creditors, it now owed but one debt to one creditor—the Union. Not only this, but under the Agreement between the American and the Union the obligations of the American had been actually increased, not diminished. Yet under the provisions of the Act of June 30, 1876, the Comptroller ought not to and, of course, would not have consented to the appointment of "an agent" by the shareholders, unless he was ignorant of the Agreement or had concluded that by it all the debts of the American had been paid and that all the agent had to do was to collect and distribute any assets, which might thereafter be returned into the possession of the American. Appellees cannot, therefore, argue that the transaction was approved by the Comptroller. Although, of course, his approval of an *ultra vires* act would not make it *intra vires*.

But to proceed—On January 12, 1897, at the next annual meeting of the shareholders, a report (Exhibit 24, p. 274) was read showing the condition of the assets which had been transferred to the Union to be liquidated and was intended to show the progress of that liquidation, (Wyman, p. 178). It was or-

dered spread upon the records but *was not approved.* It simply showed that nothing had yet come into Kimball's hands as "agent."

Having reviewed the meetings of the shareholders let us see at which meetings these verious appellants were present.

Of the appellants in No. 19,652, Wyman and Levy, and of the appellants in No. 19,653, Frenzer, Wallace and Smith, there were present at the three meetings above mentioned the following, to-wit: On January 14, 1896, Levy, Wyman and Wallace personally and Frenzer by proxy. On February 25, 1896, Levy, Wyman, Wallace and Smith. On January 12, 1897, Wyman and Wallace.

We have shown that nothing was done at any meeting which could be fairly construed to be an *affirmative* endorsement of the transaction, nor is there any evidence that the Union National had any knowledge of what took place or in any manner whatever *relied* thereon, *so as to change its position upon the faith thereof.* But the Court of Appeals said, (p. 399): "When it is considered that the Union National was engaged in carrying out its part of the contract, was disbursing its funds in taking up and caring for the contracts, debts and engagements of the American National, the duty of the shareholders of the latter in a meeting assembled, to *then repudiate the transaction,* if they ever desired to do so, was imperative."

These words would seem to limit the necessity of repudiation to the *first* meeting of the shareholders held on Jan. 14, 1896, and to those *then present.* But what was the status of affairs on that day? The appellees on p. 54 of their brief filed in the Court of Appeals say: "We cannot tell how much the Union National had paid on Dec. 23. It may have paid one hundred thousand dollars or it may have paid less; that is immaterial, but the material thing is that the Union National, a

solvent, reliable bank, *had become liable to pay over two hundred thousand of obligations*, and the American National was released and discharged to that extent." The evidence is that one hundred depositors called on Monday, Dec. 23rd and received cash or new pass books from the Union National (Record, p. 184); that most of these depositors, so far as amounts were concerned, had, immediately after Dec. 23rd, consented to be and thereby became depositors of the Union (Record, p. 194); and that the Union had paid out in thirty days about one hundred and fifty thousand cash (Record, p. 196.) The failure to prove the exact status of affairs on Jan. 14, 1896, was the failure of complainant, and he and the Union were the only parties who had the *data*. Enough appears, however, to show that the Union had *before* that date either paid or agreed with third persons to pay practically *the whole amount* it had assumed in the Agreement. There is not the slightest evidence, however, that any one of the shareholders present at that meeting (except those officers directly engaged in the transaction) knew how much or how little the Union had paid out under the Agreement, or how far it had committed itself to third persons. Apparently it had done all it agreed to do, or the officers of the American could not honestly have kept silent before the shareholders then present. The officers of the Union gave the shareholders of the American no information. It is not equitable to permit such officers of the Union to remain silent and then charge those shareholders of the American present at that meeting with knowledge which they did not possess. "Repudiation," as far as those shareholders had knowledge, would have been an absolutely useless formula.

But even were the facts otherwise, was it the duty of the shareholders then present "to repudiate" the transaction? A transaction may be repudiated (1) by word or (2) by act. As to the first, the Court of Appeals says in effect that such of the

appellants as were present (for the notices calling the various meetings did not mention the transaction) were silent when they ought to have spoken. But does the rule apply, when to speak would simply be to give voice to one's surprise and disappointment at something *irretrievably* consummated? It seems inequitable to permit the Union to consummate a deal with the officers of the American, which it knew ought (if legal under any circumstances) to be submitted to the shareholders of the American and to the Comptroller for approval before consummation, and then to say that the individual shareholders of the American should make some formal complaint or be concluded thereby and become *individually* liable therefor.

But equity does not require a vain thing; and what good would a protest have done the Union or the shareholders of the American, and if it would have done no good, why should it have been made? The transaction was a secret one and was fully consummated before the great majority of the shareholders of the American had knowledge thereof, and they were from the *peculiar nature of the case* without remedy. It is inconceivable to us that a protest could have done any good to any one of them, whether made collectively or individually. As to the second, what action could have brought them any relief whatever? If the Union by any conceivable process of law or otherwise, could have been promptly driven out from the offices of the American and the American could have been replaced in possession of its place of business, together with its books and its diminished assets, it would not have been a bank in operation. But the fact that a bank is in full operation gives to their stock therein its principal value to the shareholders, i. e., its income producing feature. For the shareholders of a bank out of business simply own *choses in action* awaiting upon its liquidation. But even if reopened, the American would have been a bank under suspicion and without depositors, and to no busi-

ress is the confidence of the public so essential as it is to banking, and a bank without depositors is but a name.

Nor, on the other hand, would an attempt by the shareholders of the American to regain possession of its offices, assets and good-will and to put it on its feet again, have been of any conceivable benefit to the Union. Such an attempt was not practicable, of course, because (among other reasons) the Union had already appropriated the cash and cash assets of the American. But the mere attempt would have been disastrous to the Union. For that bank had already vacated its former place of business and would unquestionably have been confronted with a run and would, also, have ben compelled to wait for the liquidation of the American by the Comptroller before it could have recovered the amount it had expended in carrying out the Agreement.

Nor would a mere protest by any one or all of the shareholders of the American have been of any benefit to the Union, for it, on the one hand, had already changed its location and assumed all its obligations to third parties under the Agreement and could not evade or escape from them; and, on the other hand, had obtained *all* the assets of the American so that it could take no other steps or means to secure itself farther.

The bald fact is, that a mere protest on the part of the shareholders of the American would have done no good and any action in any court on their part against the Union, would have brought disaster to the Union and no further relief to them.

But the Court of Appeals says (Record, p. 398), "Shortly after the execution of the contract of December 21, 1895, and before the adoption of the resolution for liquidation a writing containing an express ratification of the action of the directors in respect to the contract between the two banks was executed by the owners of more than two-thirds of the stock of the American National." This writing should not, of course, in equity

bind those shareholders who did not sign it, nor should it have the slightest effect upon the question of their individual liability as shareholders. It was not signed by either appellant Frenzer or appellant Smith. It is marked Exhibit 25 (Record, p. 227) and is as follows: "The undersigned, owners of the number of shares of the Capital Stock of the American National Bank of Omaha, set opposite our respective names, hereby ratify and confirm the action of the directors of the American National Bank of Omaha, in entering into and executing a certain Agreement between said American National Bank and the Union National Bank of Omaha, a copy of which Agreement is hereto attached."

The Court of Appeals seems to have reasoned, first, that because Section 5220 of the United States Revised Statutes authorizes two-thirds of the shareholders of a national bank to go into voluntary liquidation, therefore *a vote* of two-thirds would also authorize the directors to enter into the Agreement; and second, that as a consequence, a ratification (assuming there was one) by two-thirds of the shareholders *acting individually* would bind those who did not ratify. But these assumptions are not well grounded. At common law, *all* the shareholders must unite in order to authorize a voluntary winding up of a corporation. It follows, then, that Section 5220 makes an *exception* and gives three-fourths of the shareholders a power not otherwise possessed; and a special grant of power cannot be extended beyond the terms of the grant. Again, it is well established that the power of stockholders to manage the affairs of a corporation and to bind it and their fellow stockholders by their action, is vested in them *collectively as a body in meeting assembled.* It follows, then, that this instrument was not a ratification *at law* and was not binding upon the American National--the corporation—and could not invest the transaction with any legality which it did not *ipso facto* pos-

sess. Nor could it *in equity* affect the rights of the corporation or of those shareholders who did not sign, which rights came into being and became vested immediately upon the execution of the Agreement and the delivery of the assets and notes in accordance with its terms on December 21-23, 1895. The signers acted as individuals and as such only can be judged.

Let us, then, first inquire when and why this paper was signed. It shows on its face that it was signed some time *after* the transaction in question. Two witnesses testified in regard to it. Mr. Wattles says (Record, p. 242) that he first saw it a day or two before the meeting of the stockholders of the American, which meeting was held, he thinks, February 26, 1896; that it was gotten up by Mr. Kimball, president of the American, without consulting him; that it was shown him because (p. 243) he had asked Mr. Kimball regarding the probability of a favorite vote to liquidate the American and as evidence that the vote would be favorable; and that he thought (without having any personal knowledge) it was signed during the next week or ten days after the transfer was made. Mr. Wyman (p. 174) said on cress examination that he thought it was signed after January 1, 1896. This fact is patent, that it could not have been an *inducement* to the Union to enter into or complete the transaction, for that was done on December 21-23, 1895. It is evident also, that the paper was gotten up and circulated *without any reference* to the Union or Mr. Wattles would have known about it. It probably had its origin in the desire of Mr. Kimball to protect himself and the other officers, who had acted with him and under his advice. But whatever his motive, the paper shows on its face that it was not intended to have and it does not in fact, have any *reference to the shareholders or to their liability as such.* Nor was it so considered by Mr. Wattles. Indeed, according to the evidence all those engaged in the transaction on both sides were then of the opinion that the as-

sets of the American were abundant to pay and more than pay all its liabilities. Neither the Unior nor its friends in the American, nor those shareholders of the American who were persuaded to sign, anticipated any necessity for looking beyond the assets held by the Union. Even Mr. Wattles, the active officer of the Union, paid no attention whatever to the liquidation until about December, 1896. See his testimony, Record, p. 247 and 249. To hold this paper evidence of an intent to bind themselves individually or to hold that it had any effect in that direction, would be to ingraft into it a purpose and meaning it did not have in the minds of any person directly or indirectly interested in the transaction of Dec. 21-23, 1895. It was not until later, when doubt arose as to the sufficiency of the assets of the American, that the thought occurred that possibly the shareholders might still be liable, because of this writing, notwithstanding the non-negotiability of the notes given by the American to the Union and the nature of the transaction.

All of the meetings aforesaid occurred *long after* the business and assets of the American had been actually transferred to the Union and long after the Union had taken actual possession of the books, the assets and the offices of the American. This was true also of the signing of the aforesaid Exhibit 25. All of these things transpired and all of these acts were done long after the consummation of the transaction between the American and the Union, which had occurred on Dec. 21-23, 1895. Neither at these meetings nor in the writing aforesaid, was there anything *to direct the attention* of the shareholders to the question of their personal liability as shareholders. In nothing that they did and in nothing that they heard and in nothing that they signed, was there any intimation on behalf of the Union or its friends, that it expected the stockholders of the American to make good the transaction of Dec. 21st, if there should unexpectedly happen to be a deficit arising therefrom.

In no respect and at no time had the Union been *induced to act* upon the assumption that it might in the case of necessity look to the shareholders of the American. If they have received any benefit from the transaction, it has been without any action on their part. But they have received no benefit. A judgment against them of $97.23 per share of $100.00 shows this conclusively. If the directors had submitted the matter to the Comptroller and he had required the shareholders to make good the *whole* Capital Stock, the shareholders would have paid only $2.77 per $100.00 more than they have been adjudged to pay by the Circuit Court, and would have had *all* of the assets of the American on hand to make them good. The fact that the American may have received (although in fact, it did not receive) some benefit, does not affect them; just as the fact that the *Western I. L. & T. Co.* had received a valuable consideration for its *ultra vires* guaranty and that incidentally its shareholders may have been benefited thereby, did not affect the question of the liability of the stockholders in that company in the case of *Ward vs. Joslin ante.* These appellants did not act *in their capacity of shareholders* at any time or in any way so as to bind themselves as such or to lead the Union to rely upon their statutory liability as such.

Scovil vs. Thayer, 105 U. S. 143 (1882), 26 Law. Ed. 968, was an action by an assignee in bankruptcy of the Fort Scott Coal and Mining Co. to recover, for the benefit of creditors of that company, against Thayer as a shareholder therein upon the third and fourth issues of stock which the court held to be void for the reason that the corporation had no implied power to change the amount of its capital as prescribed in its charter. The court says (p. 149):

> "It is insisted, however, that the defendant in error having attended by proxy the meetings at which the increase of the stock of the company beyond the limit im-

posed by law was voted for, and having received certificates for the stock thus voted for, and after such increase the company, by its agents having held itself out as possessing a capital of $400,000, and invited and obtained credit on the faith of such representations, he is now estopped from denying the validity of the stock and his obligation to pay for it in full."

And concludes (p. 151) after examining cases:

"Upon the principles stated in these authorities, we are of the opinion that the defendant in error is not estopped by any acts of his, to assert the invalidity of the stock issued, in excess of the limit authorized by the charter, and *deny his liability thereon.*"

In *Thomas vs. West Jersey R. R. Co.*, 101 U. S. 71 (1880), 25 Law. Ed. 950, Thomas and others had entered into a contract with the railroad company, which had been confirmed *by a vote* of its stockholders and which contained a provision for arbitration in the event of its termination as therein provided. The company terminated the contract but refused to arbitrate. Thomas, *et al.* then sued the corporation for damages. The court held the contract *ultra vires* and no recovery could be had, saying (p. 86):

"But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely: the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action; damages for a material part of the contract never performed; damages for the value of the contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-performance. As to this, it is not an executed contract."

In the case at bar, the Agreement has been executed except

the payment of the balance remaining unpaid upon the notes and for this balance judgment is asked. Even part performance and the formal vote (which, of course, there never was) of its shareholders could not validate such an Agreement or the notes issued thereunder even as against the American.

In *Bloomfield vs. Charter Oak Nat'l Bank*, 121 U. S., 121, 135 (1887), 30 Law. Ed. 923, the court said: "And no estoppel *in pais* can be created, *except* by conduct which the person setting up the estoppel has the *right* to rely upon, and *does in fact* rely and act upon."

It was held in *Mutual L. Ins. Co. vs. Mowry*, 96 U. S. 544, 547 (1878), 24 Law. Ed. 674, that "The *only* case in which a representation *as to the future* can be held to operate as an estoppel is where it relates to an *intended abandonment* of an *existing* right, and is made to *influence others*, and by which they *have been induced to act*."

In this connection and as bearing upon the questions of estoppel and ratification the Record shows the following:

First, that complainant is the *assignee* of a *non-negotiable* instrument, which was transferred to him *after maturity* and for the *sole purpose* of enabling him to bring this action; that he personally never had any dealings with, or occupied any relation to, the American or its shareholders; that he has neither done nor suffered anything by reason of any acts, or failure to act, of the American or its officers or its shareholders; that he simply stands in the shoes of the Union, having no other rights than it can have and being chargeable with notice of what the Union knew and did.

Second, that complainant came into court and asked its assistance to *execute further* the Agreement between the American and the Union by liquidating the assets remaining unliquidated by the Union, by applying the proceeds, and by rend-

ering and enforcing a judgment against these appellants for any deficit left unpaid upon the note so assigned to him.

Third, that appellants are not asking any *affirmative* relief against any one or anything, but are simply defending themselves against a judgment for a deficiency based upon an alleged claim against the American for which they insist they are not responsible or liable.

Ever since Monday, December 23, 1895, when the Union opened its doors to the depositors of the American with their names on its books and the American's assets in its control, the shareholders of the American have been helpless in fact, whatever theoretical rights they may have had. At no time since that morning, have they stood on equal ground with the Union. It is not right to apply the same standards of conduct to the helpless that we apply to those who are free to choose what they shall or shall not do. When appellees came into a court of equity and asked *affirmative* relief, they should have been met with the maxim which underlies the whole of equity jurisprudence, "He who comes into equity must come with clean hands." Nor would the result of this maxim result in injustice. The Union, on the other hand, has secured the only objects it had in view—the business and good-will of the American. It is true, it has paid more therefor than it had intended to pay. But the shareholders of the American are not even morally responsible for that. They made no representations to the Union. What the results of that transaction were, on the other hand, as they affected the interests and rights of the shareholders of the American, we have hereinbefore set forth on page 44 et seq. and need not repeat them.

The Union was an active and necessary party in that transaction, and is responsible for the results thereof. Even if the American had been unable to continue business (which is very doubtful), the Union for its own purposes and for its own gain

interfered with the method of liquidation provided by law and deprived the shareholders of a vested right to have their individual liability for each claim determined in the manner provided by the banking laws of the United States, and subjected them to delay, expense and loss which they never contemplated when they became shareholders. Equity cannot replace the shareholders of the American *in statu quo* they stood before December 21-23, 1895. But equity should not, in effect, put the Union in the shoes of the creditors of the American then existing, unless it can also place its shareholders in the position they then occupied and give them the rights they then had; which were, among others, to decide whether to assess themselves if necessary to continue in business, or to enter upon liquidation in one of the two ways provided by the laws under which they were organized. We contend that *at the moment* the transfer was made and the notes delivered, the question of the liability of the shareholders was determined and settled forever, unless they thereafter did something intentionally to impose upon themselves a *new* liability—a new *contractual* liability in lieu of their *statutory* liability. And that none of them ever did.

But even if the transaction was intra vires or being ultra vires was capable of being made *intra vires* by ratification or estoppel, still the nature of the transaction was such (being far outside of the ordinary course of the business of banking) and the liability of the shareholders of national banks is so restricted (as shown on page 64 et seq. *ante*), that these appellants should not have been held liable for a deficiency arising therefrom. Ratification or estoppel cannot change the *nature* of the transaction. Either might, according to some authorities, have prevented any particular shareholder, so situated, from *interfering* with the Union and Kimball in the management and application of the assets in their control, but would not have imposed upon such shareholder any liability not imposed by Sec. 5151 Revised Statutes.

But the tacit assumption by the Court of Appeals and our previous assumption, *arguendo,* that a contract *ultra vires* a corporation can be rendered enforceable against its shareholders by ratification or estoppel, seems to be directly contrary to the opinions of the Supreme Court.

In *First Nat. Bank of Conrad,* 174 U. S. 364, 372 (1899), 43 Law. Ed. 1007, the court after holding that a national bank is *impliedly* prohibited from acquiring and holding the stock of another national bank as an investment and also that *the bank itself* is not estopped to set up that defense and that such transaction being void cannot be confirmed or ratified, says (p. 372):

> "If the previous reasoning be sound, whereby the conclusion was reached that, by reason of the limitations and provisions of the national banking statutes, it is not competent for an association organized thereunder to take upon itself, for investment, ownership of such stock, no intention can be reasonably imputed to Congress to *subject the stockholders* and creditors thereof, for whose protection those limitations and provisions were designed, to the same liability by reason of a void act on the part of the officers of the bank, as would have resulted from a lawful act."

Ward vs. Joslin, 186 U. S. (1902) was an action to enforce the *statutory liability* of a shareholder in a Kansas corporation just as this is an action to enforce the liability of shareholders under Sec. 5151 of the U. S. Revised Statutes. The Kansas corporation had guaranteed in writing the payment of certain notes (p. 143), which guarantees were given without authority (p. 149.) In the case at bar, the attempt is to secure judgment for the balance remaining unpaid upon notes issued by the American. In an action so alike in form and affecting persons holding positions so nearly identical, it would seem that these words (p. 151) of the Supreme Court would be decisive.

> "*The rule of this court is* that a contract made by a corporation beyond the scope of its powers, *expressed or*

implied, cannot be enforced, or rendered enforceable, by the aplication of the principle of estoppel."

See also cases heretofore cited.

The Court of Appeals finally says (Record, p. 400): "In equity the claims of the complainant and the Union National represent the contracts, debts and engagements of the American National for which the stockholders of the latter are responsible in accordance with the provisions of section 5151 of the Revised Statutes."

1. This conclusion is not based upon any averment in the bill or the amended bill.

2. We have already, after reviewing and analyzing *Richmond vs. Irons, Schrader vs. Mfgrs.' Nat'l Bank, and Ward vs. Joslin*, stated as a conclusion therefrom on page 68 *ante*: "And it further appears that the fact that the new obligation *takes the place* of an old obligation for which the shareholders may have been liable, does not make them liable for such new obligation."

3. The evidence does not show that all claims against the American, which were paid off or were assumed by the Union, were claims for which the stockholders of the American would have been liable We may assume they were such, but we cannot know they were such from the evidence.

4. Even if the payment or assumption of the debts of the American by the Union was all there was to the transaction, the doctrine of subrogation would not apply. For there was an entirely *new* deal and the Union did not buy the claims of the creditors of the American in fact or by implication. One who is under no prior obligation to pay the debts of another, or one who does not pay off the debts of another for the purpose of protecting a lien theretofore held by him against the property of that other, is held to be a volunteer, and one who

voluntarily pays the debts of another is not subrogated to the rights of the creditors thus paid off.

In *Aetna Life Ins. Co. vs. Middleport*, 124 U. S. 534 (1888), 31 Law, Ed. 537, the court says on p. 547:

> "One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor; that, being enforced under such circumstances to pay off the debt of a creditor who had some superior lien or right to his own, he could, for that reason, be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor."

The court says further on p. 549:

> "In *Gadsden vs. Brown*, Speer's Eq. (S. C.) 37, 41, Chancellor Johnson says: 'The doctrine of equity is a pure, unmixed equity, having its foundation in the principles of natural justice, and from its very nature could never have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound; and, so far as I have been able to learn its history, it has never been so applied. If one with a perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound who could not chose to abide the penalty.'
>
> This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere."

And the court thus concludes on p. 551:

> "No case to the contrary has been shown by the researches of plaintiff in error, nor have we been able to find anything contravening these principles in our own investigation of the subject."

The conclusion seems to be (1) that the nature of the transaction, of which the three notes were a part, was such and the statutory liability of the shareholders in national banks is so restricted, that appellants are not liable under the Statutes for the balance unpaid upon the notes; and, (2) that appellants have not done anything (even if they could have done anything) to change their individual statutory liability into an individual contractual liability. Nor does this conclusion lead to unjust results.

The American and the Union were both national banks and were organized and doing business under the same laws . Their officers actually knew, as well as were chargeable with knowledge of, the limitations fixed by law upon the powers of both banks. They actually knew the purpose, the nature and the possible results of the transaction in which they engaged. The officers of the Union relied upon the belief, then entertained strongly, as shown by the evidence, that the assets of the American, which were transferred to the Union, were amply sufficient to justify it, as a business venture, *in buying out a rival and acquiring its good will.* Years after the transaction, when the status of all the parties has been irrevocably and materially changed, complainant brings this action to compel the shareholders of the American to make good the loss unfortunately sustained,—but sustained largely by reason of the method of liquidation adopted and the management of those assets. This, it is respectfully submitted, they should not be required to do.

Howard B. Lamb
Westel W. Moorman

Solicitor and of Counsel for Appellants.

January, 1906.

APPENDIX.

EXHIBIT A.

(Italics are mine.)

This Indenture Witnesseth—That the American National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the first part, has and by these presents does hereby agree for the consideration hereinafter expressed to and with said Union National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the second part, as follows, to-wit:

First. The party of the first part hereby agrees to sell and assign and *does hereby sell and assign* to the party of the second part the *business* of the party of the first part, its *cash on hand, office furniture* and *fixtures* and such *of its bill receivable* as the party of the second part on examination may be willing to take as cash without recourse on the party of the first part.

Second. The party of the second part hereby agrees to purchase and does hereby purchase from the party of the first part the business of the party of the first part, cash on hand, office furniture and fixtures, and such bills receivable as the party of the second part may be willing to take as cash on examination of the same without recourse on the party of the first part and to pay the party of the first part for said office furniture and fixtures the sum of three thousand seven hundred and fifty ($3,750.00) and to assume the liabilities of the party of the first part to its depositors and on account of its bills payable and *to liquidate* the remaining assets of the party of the first part which may not be taken and received as cash by the party

of the second part, without charge or expense to the party of the first part, except such court charges and attorney's fee's as may be found necessary, and that such liquidation shall be conducted *under the direction* of Thomas L. Kimball or such other person as may be agreed upon on behalf of the stockholders of the party of the first part, it being understood and agreed that said Kimball or his successor shall represent in said liquidation the stockholders of the party of the first part, and shall receive, hold and use the proceeds of the assets of the party of the first part as trustee of the parties hereto for the mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary court charges and attorney's fees attending said liquidation shall be incurred under the direction of the said Kimball, or his successor.

Third. In consideration of the above agreement of the party of the second part, the party of the first part hereby agrees to *sustain and pay* one-half of the loss and expense which the party of the second part may sustain on acount of the removal from its present quarters by reason of its unexpired lease on its present place of business, and one-half of the loss which the party of the second part may sustain on the sale of its office furniture and fixtures, which furniture and fixtures are agreed upon at the present price and value of three thousand seven hundred and fifty ($3,750.00) dollars, and the party of the first part further agrees to guarantee and *does hereby guarantee* the party of the second part against any and all loss on account of assuming the liabilities of the party of the first part as aforesaid. *And to this* end the party of the first part agrees to execute and deliver to the party of the second part its three promissory notes of equal sums for the amount of liabilities which the party of the second part may assume after crediting the full amount of cash on hand and bills receivable and other assets which may be accepted by the party of the second

part or examination, which notes shall draw interest from date at the rate of six per cent. per annum, payable quarterly annually, and be payable in one, two and three years from date, respectively, and shall be non-negotiable. And in case of nonpayment of any of said notes when due the whole of said principal sums of all of said notes and accrued interest shall thereupon become due. And as further security to the party of the second part the party of the first part agrees to sell and assign and *does hereby sell and assign* to the party of the second part *all* of its assets which may remain *after the selection* therefrom by the party of the second part heretofore mentioned, including all its bills receivable, stocks, *bonds*, personal property of every kind and all real estate and rights and interests therein or liens thereon with the understanding and agreement that the party of the second part shall have and hold said assets and properties subject to the right of said Thomas L. Kimball, or his successor, to collect and convert the same into cash for the uses and purposes hereinbefore expressed.

And it is further agreed that the party of the first part may pay and have credited on said notes at any time prior to maturity any sums of money of five hundred ($500.00) dollars and upwards, provided the sums so paid shall be in even hundreds.

Witness the names and corporate seals of the parties hereto this 21st day of December, A. D. 1895.

EXHIBIT B.

Sect. 14, Art. XVI of Constitution—"The terms of office of all state and county officers * * * * * shall begin on the first Thursday after the first Tuesday in January next succeeding their election * * * * *" If an election took place in 1895, then the new state and county treasurers would have assumed the duties of office on January 9, 1896.

EXHIBIT C.

Section 11 of Charter of Omaha—"The officers to be elected • • • • shall be a mayor • • • treasurer • • • and shall • • • • hold office • • • • • commencing on the first Tuesday in January succeeding such election • • •." This was January 6, 1896, if an election took place in 1895.